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APPENDIX

In The

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 532

ROBERT D. MORGAN,

Petitioner,

vs.

METRO-GOLDWYN-MAYER, INC.,
a Delaware corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

STEWART L. UDALL
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Washington, D.C. 20006
Attorney for Petitioner

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APPENDIX A

DOCKET ENTRIES

Date	*Document*
Dec. 13, 1962	Complaint filed
May 22, 1963	Defendant's answer filed
Jan. 20, 1964	Motion to Set, Certificate of Readiness and Request for Jury Trial filed by plaintiff
Feb. 19, 1964	Plaintiff's Motion for Priority trial granted
Apr. 30, 1964	Defendant's Motion to Dismiss and for Preliminary Hearing pursuant to Rule 12(d)
May 19, 1964	Court order granting defendant's Motion for Preliminary Hearing for June 10, 1964, further ordering Pretrial for May 26, 1964, further ordering trial of this cause set for June 15, 1964 at 9:30 a.m. in Division 6 to a jury
May 26, 1964	Pretrial order
June 17, 1964	Trial court's order granting defendant's Motion to dismiss
Jan. 5, 1965	Findings of Fact, Conclusions of Law and Judgment
Apr. 12, 1965	Motion for New Trial on Grounds of Newly Discovered Evidence, Fraud, Other Substantial Reasons Justifying Relief pursuant to amended Rule 60(c) A.R.C.P.
Apr. 12, 1967	3-2 written decision and dissent of the Arizona Supreme Court, *Morgan v. Hays*, supra
Apr. 26, 1967	Application for Relief from Final Judgment on Grounds of Newly Discovered Evidence, Fraud, Other Substantial Reasons Justifying Relief filed in Supreme Court, State of Arizona
May 9, 1967	Order denying relief without prejudice to proceed in the Superior Court

May 19, 1967	Amended and Supplemental Motion for New Trial on Grounds of Newly Discovered Evidence, Fraud, Other Substantial Reasons Justifying Relief filed in Superior Court pursuant to Supreme Court order
July 25, 1967	Trial court's order denying plantiff's Motion for New Trial under Rule 60(c) A.R.C.P.
Jan. 6, 1970	Court of Appeals of Arizona, Division One, Dept. B, opinion upholding trial court.
Feb. 19, 1970	Court of Appeals of Arizona order denying rehearing
March 17, 1970	Arizona Supreme Court order denying petition to review

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

ROBERT D. MORGAN,
Petitioner,
vs.
JACK D. HAYS, Judge, Superior Court of the State of Arizona, in and for the County of Maricopa, and said SUPERIOR COURT,
Respondents,
and
METRO-GOLDWYN-MAYER, INC.
Real Party in Interest

No. 8653

Review by Certiorari from the Superior Court
The Honorable Jack D. Hays, Judge
AFFIRMED

SNELL & WILMER — Phoenix
by Mark Wilmer
Attorneys for Petitioner

RICHARD J. DANIELS — Phoenix
JENNINGS, STROUSS, SALMON & TRASK — Phoenix
by Rex H. Moore
by Rex E. Lee
Attorneys for Respondents and Real Party in Interest

McFarland, Justice:

Robert D. Morgan, hereinafter referred to as petitioner, filed a petition with this court seeking issuance of a writ of certiorari

to test the propriety of the granting of a motion to dismiss by Jack D. Hays, Judge of the Superior Court, Maricopa County, hereinafter referred to as respondent, in an action brought by petitioner against Metro-Goldwyn-Mayer, Inc. a Delaware corporation, real party in interest, hereinafter referred to as MGM.

Petitioner filed a complaint in Superior Court, Maricopa County, Arizona, on December 13, 1962, against MGM in which he alleged that on April 9, 1962, while in the employ of MGM in the capacity of a "stunt man" in the production of a motion picture "How the West Was Won," being filmed in part in Maricopa County, petitioner was injured through negligence of MGM, and suffered severe injuries as a result of said negligence. On April 30, 1964, MGM, through its attorneys, filed a motion to dismiss under Rule 12, Arizona Rules of Civil Procedure, claiming that the court lacked jurisdiction over the subject matter of the claim for relief, and sought an order setting this motion for preliminary hearing to the court. Respondent ordered the preliminary hearing on the motion to dismiss by minute entry of May 19, 1964. Petitioner filed with this court a petition for writ of certiorari on June 4, 1964, seeking relief from the order of respondent granting a preliminary hearing on MGM's motion to dismiss for lack of jurisdiction over the subject matter, on the grounds that petitioner was entitled to a jury trial. We denied this petition by order of June 9, 1964.

After a hearing lasting four days, respondent took the motion under advisement, and advised counsel that he was declining to rule upon the jurisdictional questions in advance of trial, and that the jury trial on the issue of common law negligence and damages would proceed. MGM then filed a petition for a writ of mandamus with this court. We granted a peremptory writ on June 17, 1964, which commanded respondent:

> ". . . forthwith to rule on the matter of jurisdiction of said court in the above-entitled matter before proceeding to trial."

By order of June 17, 1964, respondent granted MGM's motion to dismiss for lack of jurisdiction, and in his findings of fact and

conclusions of law respondent found that petitioner's exclusive remedy was vested either in the Industrial Accident Commission of the State of California, or The Industrial Commission of Arizona, and:

> "By virtue of the foregoing conclusions, this Court does not have jurisdiction over the subject matter of this lawsuit and therefore the defendant's Motion to Dismiss should be granted and this cause should be dismissed and judgment should be entered in favor of the defendant."

The judgment of dismissal for lack of jurisdiction was filed on January 5, 1965. Petitioner filed his notice of appeal on February 26, 1965, but the appeal was not perfected by filing within sixty days a bond for costs as required under Rule 73(b), Arizona Rules of Civil Procedure, as amended 1961.

Petitioner then filed a petition for writ of certiorari with the Court of Appeals of Arizona, Division one, which was denied.

The petition was then presented to this court, and we granted the writ of certiorari for the purpose of passing upon the question of whether the petitioner was entitled to a trial by jury on the question of whether he had made an election to receive compensation under the Workmen's Compensation Act. It is the contention of the petitioner that the trial court erred in denying a jury trial. This court is committed to the rule that a question of election to take under the Workmen's Compensation statute is a preliminary question to be decided by the trial court prior to jury trial. State v. Pressley, 74 Ariz. 412, 250 P. 2d 992.

If petitioner was covered by workmen's compensation, then his compensation would be determined by The Industrial Commission of Arizona, and the superior court would not have jurisdiction to try the issues presented; therefore, under the procedure that has been followed in this state for some fourteen years, the court must first determine whether it has jurisdiction before trying a case.

In State v. Pressley, supra, we held the question of election to

take under the workmen's compensation statute is a preliminary question to be decided by the trial court prior to trial:

"Is the trial court the proper tribunal to determine whether Pressley has made an election? The answer is Yes. Next, is it the duty of the trial judge or the jury to decide that question? The answer: the trial judge should decide that question as a matter of law.

* * *

"In Taylor v. Hubbell, supra [188 F. 2d at page 109], the court held that the question of election was one of law for the trial judge to decide, and said this:

"'It is axiomatic that "Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist." [Cases cited.] Here the district court had jurisdiction of the subject matter only if plaintiff and Sanderson & Porter were "not in the same employ" and if plaintiff had not made an election under the statute to take compensation. S. H. Kress & Co. v. Superior Court, supra, 66 Ariz. 67, 182 P.2d 931. Being jurisdictional, these issues were triable to the court, not the jury. And the district court properly withheld them from consideration by the jury . . . .'

"Wright on Subrogation, supra, page 79, section 36, says:

"'The authority of the employer, insurer or assignee to prosecute a cause of action under the subrogation statute has been held to be a preliminary question of law to be heard and determined by the trial judge and not an essential part of the plaintiff's cause triable by the jury.'

* * *

"To recapitulate, we affirm the second Pressley case in all respects. We further order, the alternative writ of mandamus heretofore issued be made preemptory and the commission be allowed to intervene; that the commission be allowed subrogation to any and all of Pressley's rights against the third party for payments made for 'accident benefits' received by Pressley;

and that the trial judge hear and decide the question of election as a matter of law before proceeding with the trial of the case on its merits." 74 Ariz. at 415, 417, 422; 250 P. 2d at 995, 996, 999

See also State ex rel. Industrial Commission v. Reese, 74 Ariz. 425, 250 P. 2d 1001.

In the Pressley case, supra, we followed the general rule, as stated in 20 Am. Jur. 2d, Courts, § 92:

"§ 92. Power and duty to determine jurisdiction.

"A court has the power and duty to examine and to determine whether it has jurisdiction of a matter presented to it, its determination being subject, of course, to appellate review. This question should be considered by the court before it looks at other matters involved in the case, and before determining whether the parties are entitled to a jury trial if the court has jurisdiction of the case . . . ." 20 Am. Jur. 2d at 453

The rule is also set forth in 21 C.J.S. Courts, § 113, as follows:

"§ 113. Power of Court to Determine Its Own Jurisdiction

"Every court has judicial power to hear and determine, or inquire into, the question of its own jurisdiction, both as to parties and as to subject matter, and to decide all questions, whether of law or fact, the decision of which is necessary to determine the question of jurisdiction. The court necessarily decides that it has jurisdiction by proceeding in the cause.

"When at any time or in any manner it is represented to the court that it has not jurisdiction, the court should examine the grounds of its jurisdiction before proceeding further, the question of jurisdiction being always open for determination. The court may receive testimony on a preliminary question to determine its jurisdiction, and is not bound to dismiss the suit on a mere allegation of lack of jurisdiction, but may inquire into the correctness of the averment." 21 C.J.S. at 174, 175

In the case of Burgess v. Gibbs, 262 N.C. 462, 137 S.E. 2d 806, the court said:

"Among other defenses, the answer of the defendant alleges as a plea in bar to plaintiff's action his immunity to suit at common law by plaintiff in this case and his nonliability under the provisions of G.S. § 97-9 and G.S. § 97-10.1 of the N.C. Workmen's Compensation Act.

"A universal principle as old as the law, is that the proceedings of a court without jurisdiction of the subject matter are a nullity. High v. Pearce, 220 N.C. 266, 17 S.E. 2d 108. If a court finds at any stage of the proceedings it is without jurisdiction, it is its duty to take notice of the defect and stay, quash or dismiss the suit. In re Davis v. Custody, 248 N.C. 423, 103 S.E. 2d 503. This is necessary, to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment. * * * So, *ex necessitate*, the court may, on plea, suggestion, motion, or *ex mero motu*, where the defect of jurisdiction is apparent, stop the proceeding.' Branch v. Houston, 44 N. C. 85.

"When the trial judge in the absence of the jury heard and decided all questions relating to the court's jurisdiction to entertain the instant action, he followed the sound rule that every court necessarily has inherent judicial power to inquire into, hear and determine the questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction. [Cases cited.]

"In Bridges v. Wyandotte Worsted Co., supra, [243 S.C. 1, 132 S.E. 2d 18], the Court said:

"'The issue of jurisdiction is basically one of law. It involves the determination by the court of its right to proceed with the litigation. A decision of this question by the court deprives a litigant of no right to a jury trial of the issue of liability because, if the court has no jurisdiction, the litigants have no rights which they may assert in that court. The right to have a jury pass upon the controverted factual issues must of necessity relate

to the assertion of the right of the litigant which has been allegedly violated, which presupposes a court having jurisdiction to grant the relief sought. The determination of the jurisdictional question by the court is not a denial of any constitutional right of a litigant to a jury trial, but simply a determination of the forum in which those rights may properly be asserted. The decision of the question of whether the court has jurisdiction is a preliminary one to the determination of the merits of the cause, and is for the court to decide . . ." 93 S.E. 2d at 807, 808

In Adams v. Davison-Paxon Company, 230 S.C. 512, 96 S.E. 2d 566, the court stated the same rule:

"It has been consistently held that whether the claim of an injured workman is within the jurisdiction of the Industrial Commission is a matter of law for decision of the court which includes the finding of the facts which relate to jurisdiction. [Cases cited.]

"Thus the trial court should have in this case resolved the conflicts in the evidence and determined the fact of whether Emporium was performing a part of the trade, business or occupation of the department store-appellant and, thereby, whether respondent's remedy is exclusively under the Workmen's Compensation Law . . ." 96 S.E. 2d at 571, 572.

Petitioner relies most heavily on the case of Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 2 L.Ed. 2d 953, 78 S.Ct. 893, in which the Supreme Court of the United States refused to follow the procedure of the state court in South Carolina; however, in doing so, it is recognized a distinction in the procedure in the federal courts and that in the state courts which distinction is specifically applicable in the State of South Carolina.

The Court stated:

"We have discussed the problem upon the assumption that the outcome of the litigation may be substantially affected by whether the issue of immunity is decided by a judge or a jury

But clearly there is not present here the certainty that a different result would follow; cf. Guaranty Trust Co. v. York, 326 U.S. 99, 89 L.Ed. 2d 2079, 65 S.Ct. 1464, 160 A.L.R. 1281, supra, or even the strong possibility that this would be the case, cf. Bernhardt v. Polygraphic Co. of America, Inc. 350 U.S. 198, 100 L.Ed. 199, 76 S.Ct. 273, supra. There are factors present here which might reduce that possibility. The trial judge in the federal system has powers denied the judges of many States to comment on the weight of evidence and credibility of witnesses, and discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence. We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disrupted factual issues to yield to the state rule in the interest of uniformity of outcome." 2 L. Ed. 2d at 963, 964

We would also call attention to the fact that this was not a unanimous opinion, and the dissenting opinion, as stated by Justice Whittaker, succinctly states why we should not depart from Pressley, supra.

"It thus seems to be settled under the South Carolina Workmen's Compensation Law, and the decisions of the highest court of that State construing it, that the question whether exclusive jurisdiction, in cases like this, is vested in its Industrial Commission or in its courts of general jurisdiction is one for decision by the court, not by a jury. The Federal District Court, in this diversity case, is bound to follow the substantive South Carolina law that would be applied if the trial were to be held in a South Carolina court, in which State the Federal District Court sits. Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S.Ct. 817, 114 A.L.R. 1487. . . .

* * *

. . . [W]e are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, *the forms and*

mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic . . ." 2 L.Ed. 2d at 968, 969

Justice Whittaker does not follow the reasoning of the majority in holding that the difference in the procedures allowing the "judges of many States to comment on the weight of evidence and credibility of witness, etc.," as sufficient safeguard against affecting the substantial rights of the parties.

Petitioner has also cited a number of Arizona cases which he contends supports his position, which were decided prior to our decision in Pressley, supra. We do not deem it necessary to comment on these cases, for the members of the court were aware of them at the time of the decision in Pressley. We also call attention to the fact that such cases as Boyden v. Lamb, 152 Mass. 416, 25 N.E. 609 (1890), and Coghlan v. White, 236 Mass. 165, 128 N.E. 33 (1920), dealt with a waiver of the right to bring court damages after electing to receive compensation. In a more recent case, Nealon v. Sullivan, 334 Mass. 213, 134 N.E. 2d 886 (1956), the Massachusetts court, in determining the question of whether an election in a workmen's compensation case should be decided by the judge or the jury, the court stated:

". . . If having accepted compensation he prosecutes an action at law against such other person, a preliminary question is presented to the court whether such action was authorized. This question is to be decided by the judge. (Citing cases)" 134 N.E. 2d at 889

State v. Pressley was decided after mature consideration. Such a case should not be overruled unless it is required by impelling reasons. We find no such reasons to permit the question of jurisdiction to be submitted to a jury in the trial of the case on the merits which might well result in a two or three week trial in a case where the court would have to direct a verdict in favor of a defendant under the evidence. We do not feel that the rule (Rule 42(b) Arizona Rules of Civil Procedure, 16 A.R.S., as amended 1966) permitting the court to order a separate trial on the ques-

tion of jurisdiction would be sufficient to overcome this objection, in that it would require delay and determination by the court as to whether the facts in each case would justify such a separate trial. We have held — in State ex. rel. Industrial Commission v. Reese, 74 Ariz. 125, 250 P.2d 1001 — that the Industrial Commission has a right to intervene in a question of jurisdiction. Such an intervention might also result in confusion, if the question of jurisdiction were decided by the jury.

Petitioner also contends that the court erred in that the facts did not support the court's holding that it did not have jurisdiction. One of the grounds given by the court below in so holding was that petitioner had made a waiver under § 23-1024. The court stated:

> "The plaintiff, by making a claim for Workmen's Compensation benefits and continuing to accept the same with full knowledge of his legal rights and with full knowledge of the legal conditions precedent to a suit against his employer, waived any right or option, if any, which he ever had to file any claim in this Court against his employer."

This conclusion of the court was supported by its findings of facts:

> "29. Following his admission to the hospital and on or about April 16, 1962, plaintiff sought and obtained the legal advice of the law firm of Snell & Wilmer, Phoenix, Arizona, and in particular, consulted with Mr. Frederick K. Steiner, Jr., a partner, and Donald Daughton, an associate of that law firm.
>
> "30. On April 16 and again on April 19, 1962, when plaintiff was interviewed by said attorneys while in the hospital, he was lucid and responsive and was able to give an account of the accident and expressed a strong desire to sue his employer for what he believed was their negligence. He advised said attorneys that he had signed some document respecting Workmen's Compensation and that, among other things, said document provided that this benefits would be 65% of $1,000.00 per month.

"31. The plaintiff sought and received legal advice from said attorneys with respect to whether or not he had an option to sue his employer for damages; that he was advised by said attorneys that his sole and exclusive remedy was a claim against the Industrial Commission of Arizona for Workmen's Compensation Benefits unless his employer failed to comply with the requirements of the Act in obtaining Workmen's Compensation Insurance, posting of notices or availablity of rejection slips. Said attorneys advised him that he should accept Workmen's Compensation Benefits, said advice being given both orally and in writing.

"32. After consulting with said attorneys and on or about April 23, 1962, plaintiff executed or caused to be executed and filed with the Industrial Commission of Arizona a document entitled 'Workman's Report of Injuries and Application for Benefits'."

The court went on to find the claims had been presented, and petitioner was paid compensation in a total sum of $4,795.41, and medical and hospital expense in the sum of $15,246.70. These findings of the court were substantially supported by the evidence. Under these circumstances we do not feel that the court erred in its conclusion that there had been a waiver. Since the waiver alone is sufficient, it is not necessary for us to pass upon the other matters raised by the petitioner in regard to the jurisdiction of the court, and having decided this case upon its merits it is not necessary for us to pass upon the propriety or the timelessness of the filing of the writ of certiorari after the time for appeal has expired.

Judgment affirmed.

ERNEST W. McFARLAND, Vice Chief Justice

CONCURRING:

JESSE A. UDALL, Justice

LORNA E. LOCKWOOD, Justice

STRUCKMEYER, Justice, dissenting.

The majority, in reaffirming the holding in State v. Pressley, 74 Ariz. 412, 250 P.2d 992, have compounded the error initiated by the language used in S. H. Kress & Co. v. Superior Court, 66 Ariz. 67, 182 Pac. 931 (1947). The error now results in denying petitioner the right to trial by jury guaranteed by Article 2, § 23 of the Constitution of this state.

PETITIONER'S RIGHT TO SUE

By Article 18, § 6 of the Constitution of Arizona, adopted at statehood in 1912, employees were guaranteed a right of action to recover damages for personal injuries suffered during the course of employment.

"The right of action to recover damages for injuries shall never be abrogated; * * *." Art. 18, § 6, Const. of Arizona.

Of Article 18, § 6, we said:

"Taken into consideration with the preceding sections 4 and 5, it is beyond question that the 'right of action to recover damages for injuries . . .' therein mentioned is the common-law action of negligence, * * *." Alabam's Freight Co. v. Hunt, 29 Ariz. 419, 443, 242 Pac. 658.

We also said:

"It is urged that this provision makes the former common-law action for negligence a constitutional one, and that it cannot be abrogated by the legislature. We think there is no question that this proposition, stated in the abstract, is correct." Moseley v. Lily Ice Cream Co., 38 Ariz. 417, 420; 300 Pac. 958.

Thereafter, the people of Arizona, in 1925, amended the Constitution to provide for a workmen's compensation law.

"The legislature shall enact a Workmen's Compensation Law * * * by which compensation shall be required to be paid to any such workman in case of his injury * * *; provided that it shall be optional with any employee engaged in such private employment to settle for such compensation, or to retain the

right to sue said employer as provided by this Constitution; * * *." Art. 18, § 8, Const. of Arizona.

This amendment gives an employee alternative remedies where the employee has received personal injuries. He has the option to bring suit against those responsible for his injuries or to take the benefits conferred by workmen's compensation. It does not restrict the right of action to recover damages; it simply gives an injured workman an additional remedy, the right to take compensation if he so chooses.

The legislature did enact a workmen's compensation law. It recognized and reinforced the plain language of the Constitution by providing that it would be optional with an employee as to whether he accepted compensation or retained the right to sue the employer. Laws of 1925, Ch. 83, § 60, now A.R.S. § 23-906, subsec. A.[1] By subsections B, C, D and E of § 23-906,[2] the legis-

[1] "A. Employers who comply with the provisions of § 23-961 as to securing compensation shall not be liable for damages at common law or by statute, except as provided in this section, for injury or death of an employee wherever occurring, but it shall be optional with employees to accept compensation as provided by this chapter or to reject the provisions of this chapter and retain the right to sue the employer as provided by law."

[2] "B. The employee's election to reject the provisions of this chapter shall be made by a notice in writing, signed and dated by him and given to his employer, in duplicate in substantially the following form:

"To (name of employer):

You are hereby notified that the undersigned elects to reject the terms, conditions and provisions of the law for the payment of compensation, as provided by the compulsory compensation law of the state of Arizona, and acts amendatory thereto.

"C. The notice shall be filed with the employer prior to injuries sustained by the employee, and thereafter within five days the employer shall file with the commission the duplicate of the notice so served by the employee. All employees shall be conclusively presumed to have elected to compensate in accordance with the terms, conditions and provisions of this chapter unless the notice in writing has been served by the employee upon his employer prior to injury.

"D. Every employer engaged in the occupations designated in this chapter shall post and keep posted in a conspicuous place upon his

(Continued on Page A-16)

lature provided the circumstances by which the employee signified his acceptance of the election to take compensation, thus waiving the right to sue guaranteed by Article 18, §6.

It will be noticed that in subsection B the statute uses the word "election" and in subsections C and D "elected". This election is an election of remedies.

> "An election of remedies has been defined as the act of choosing between two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts. The phrase is also used in a more restrictive sense to denote the doctrine that the adoption, by an unequivocal act, of one or two or more inconsistent remedial rights has the effect of precluding a resort to the others." 25 Am.Jur.2d, Election of Remedies, p. 646.

"An election of remedies is an affirmative defense. It must be pleaded by the party who asserts it and the burden of proof is on him to establish it." Kuhl v. Hayes, 212 F.2d 37. And see Bagwell v. Susman, 165 F.2d 412.

"But, apart from that, it is not the plaintiff's burden to prove

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(Continued from Page A-15)

premises, in all languages spoken by his employees and available for inspection by all workmen, a notice in substantially the following form:

"All employees are hereby notified that in the event they do not specifically reject the provisions of the compulsory compensation law they are deemed by the laws of Arizona to have accepted the provisions of such law, and to have elected to accept compensation under the terms of such law; and that under the terms thereof employees have the right to reject the same by written notice thereof prior to any injury sustained, and that blanks and forms for such notice are available to all employees at the office of this company."

"E. If an employer fails to post and keep posted the notice as required by this section, or fails to keep available at the place where the employees are hired the blank forms of notice to be signed by the employee, no employee who thereafter engages in employment for such employer, during the time that the notices are not posted or during the time that the blanks are not available, shall be deemed to have accepted the provisions of this chapter, and it shall be optional for such employee, if injured during the period when blanks were not available or the notice was not posted, to accept compensation under the provisions of this chapter or maintain other action against the employer."

that his action is outside the scope of the Workmen's Compensation Act, N.J.S.A. 34:15-1. Compare Butler v. Eberstadt, 113 N.J.L. 569, 175 A. 159. That would be a matter of defense to be advanced by the defendant." Dailey v. Mutual Chemical Co. of America, 125 N.J.L. 465, 16 A.2d 557, Aff'd. 126 N.J.L. 426, 19 A.2d 778.

As an affirmative defense, an election of remedies cannot be raised by a motion to dismiss as was done in the instant case. Macias v. Klein, 106 Fed.Supp. 107; Southern Farmers Asso. v. Wyatt, 234 Ark. 649, 353 S.W.2d 531; Household Finance Corp. v. Suhr, 44 Ill.App.2d 292; Vitarelli v. Brunson Const. Corp., 235 App.Div. 804, 256 N.Y.S. 637; Hanover Estates, Inc. v. Finkelstein, 194 Misc. 755, 86 N.Y.S.2d 316; Saso v. State, 20 Misc.2d 826, 194 N.Y.S.2d 789; New Hanover County v. Sidbury, 225 N.C. 679, 36 S.E.2d 242.

The choice, denominated an election by the statute, is essentially a waiver of the right of action to recover damages for injuries guaranteed to petitioner by Article 18, § 6 of the Constitution. The essence of a waiver is that there be an opportunity of choice between the relinquishment and the enforcement of a right. Arizona Title Guaranty & Trust Co. v. Modern Homes, 84 Ariz. 399, 330 P.2d 113. It is the intentional relinquishment of a known right. Murphey v. Valenzuela, 95 Ariz. 30, 386 P.2d 78; City of Tucson v. Koerber, 82 Ariz. 347, 313 P.2d 411; In re Brandt's Estate, 67 Ariz. 42, 190 P.2d 497; Meason v. Ralston Purina Co., 56 Ariz. 291, 107 P.2d 224; Southwest Cotton Co. v. Valley Bank, 26 Ariz. 559, 227 Pac. 986.

Waiver must be pleaded affirmatively.

"In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, *waiver*, and any other matter con-

stituting an avoidance or affirmative defense. * * *" Rule 8(d), Rules of Civil Procedure, 16 A.R.S. (Emphasis supplied.)

And see Allstate Insurance Co. v. Moldenbauer, 193 F.2d 663; Western Casualty and Surety Co. v. Beverforden, 93 F.2d 166; Hunter Milling Co. v. Koch, 82 F.2d 735.

The burden of proving waiver is upon the party claiming or asserting it. Cowles v. Ohio Farmers Insurance Co., 242 F.2d 73; Buffum v. Chase National Bank, 192 F.2d 58, cert. denied 342 U.S. 944, 96 L.Ed. 702, 72 S.Ct. 558. Waiver is a question of fact for the jury where the facts are disputed. Cannon v. Travelers Indemnity Co., 314 F.2d 657; Albert v. Joralemon, 271 F.2d 236; Home Indemnity Co. v. Allen, 190 F.2d 490; Ross Engineering Co. v. Pace, 153 F.2d 35. "The cases uniformly hold that questions of waiver are questions of fact to be submitted to the jury." Ross Engineering Co. v. Pace, supra, 153 F.2d 35, 50.

It is, of course, immaterial whether the selection of one or the other of the options provided in the Constitution, Art. 18, § 8, is denominated a waiver or an election of remedies. The result is the same.

> "An employer who contends that he is one of a class of persons protected from an action at law by the Workmen's Compensation Act must plead and prove the conditions necessary to bring himself within the statute. The employee is pursuing a common law remedy which existed before the enactment of the statute and which continues to exist in cases not covered by the statute. It is incumbent upon the employer to prove that the Workmen's Compensation Act is a bar to the employee's ordinary remedy." Popejoy v. Hannon, 97 Cal.2d 159, 231 P.2d 484.

At this point it might be well to summarize: One, the Constitution, by Article 18, § 6, gives petitioner a right of action to recover damages for his personal injuries — a right which "shall never be abrogated." Two, the subsequent amendment, Article 18, § 8, gives him an additional right, that is, a choice between the

right to sue or to take compensation without suit. Three, the legislative enactment, § 23-906, since it can neither augment nor diminish the right to sue granted by the Constitution, simply provides the time when and method by which the election or waiver of that right is evidenced. And four, the assertion of an election or waiver by the employer is an affirmative defense not to be determined on motion, but as any other contested factual issue.

PETITIONER'S RIGHT TO TRIAL BY JURY

By the Constitution, Article 2, § 23, the people of this state have provided:

"The right of trial by jury shall remain inviolate, * * *." We have said repeatedly that the Constitution does not give the right to trial by jury, but its purpose is to guarantee a preservation of the right. Rothweiler v. Superior Court, 100 Ariz. 37, 410 P.2d 479; State v. Cousins, 97 Ariz. 105, 397 P.2d 217; Brown v. Greer, 16 Ariz. 215, 141 Pac. 841. Since the Constitution preserves a jury trial in the common-law action of negligence. Alabam's Freight Co. v. Hunt, 29 Ariz. 419, supra, it would seem beyond the possibility of quibbling that Morgan should have had a jury trial on Metro-Goldwyn-Mayer's affirmative defense that he elected to take under the Workmen's Compensation Act, thereby waiving his common-law action.

> "It is fundamental that the California Constitution preserves to litigants the right to jury trial as it existed at common law in 1850. * * * The legislature may not, directly, or in the guise of procedural changes or changes in remedy, deprive a litigant of a jury in a case formerly triable at law. People v. Kelly, 203 Cal. 128, 133, 263 P. 226. People v. One 1941 Chevrolet Coupe, supra, 37 Cal.2d 283, 299, 231 P.2d 832." Ripling v. Superior Court, 112 Cal.App.2d 399, 247 P.2d 117.

How is it, then, that the majority of this Court now concludes, in the face of such plain, unequivocal, constitutional language that the question of petitioner's waiver of his constitutional right of action is to be determined by the trial judge?

The words of Jusice Frankfurter, in his dissent to Yonkers v. United States, 320 U.S. 685, 695, 88 L.Ed. 400, 64 S.Ct. 327, capsulizes the problem here:

> "'Jurisdiction' competes with 'right' as one of the most deceptive of legal pitfalls."

We have here a simple case in which the petitioner is seeking to exercise his constitutional right but the majority persist in talking about "jurisdiction."

The Arizona Constitution, Article 18, § 6, speaks of the "'right of action' to recover damages." The right to bring suit to obtain the relief sought is a "right of action." It is the right to pursue a remedy.

> "At the risk of being elementary, it is well to define certain terms — the more so as they have been, at times, a source of confusion. The right of action is merely the right to pursue a remedy." Yankwich, J., in United States v. Standard Oil Co. of Calif., 21 Fed.Supp. 645, 660.

And see Adams v. Albany, 80 Fed. Supp. 876; Foster v. Humburg, 180 Kans. 64, 299 P.2d 46; Douglas v. Daniels Bro. Coal Co., 135 Ohio St. 641, 22 N.E.2d 195, 125 A.L.R. 761; Landry v. Acme Flour Mills, 202 Okla. 170, 211 P.2d 512; Eastside etc. Co. v. Southeast Portland Lumber Co., 155 Ore. 367, 64 P.2d 625; Elmo v. Gaines (Tex.), 282 S.W. 835; Seymour v. Richardson, 194 Va. 709, 75 S.E.2d 77.

The statute does not confuse "jurisdiction" with the "right to pursue a remedy."

> "The right to recover compensation pursuant to the provisions of this chapter for injury sustained by an employee shall be the exclusive *remedy* against the employer, except as provided by §§ 23-906 * * *." A.R.S. § 23-1022. (Emphasis supplied.)

It says the right to recover compensation shall be the remedy.

The error in confusing jurisdiction with the petitioner's right to pursue a remedy in the superior court originated in S. H. Kress

Co. v. Superior Court, 66 Ariz. 67, 182 P.2d 931. There, a suit was brought by a minor, age thirteen, against the Kress Company for his personal injuries. The Kress Company brought a writ of prohibition in this Court. In the course of the decision holding that a minor could make a valid election, the Court said:

> "* * * it is the prime contention of the respondent that in light of the constitutional provision heretofore quoted, the child labor laws of our state and sections of our Workmen's Compensation Law that the child involved in this case was not sui juris to make a binding election before injury so as to make the Workmen's Compensation Act his exclusive remedy, and the writ of prohibition in this case should not issue since the Superior Court has jurisdiction to hear this case."

It then said this:

> "Statutes direct that the Superior Court has no jurisdiction to hear this case if the injured boy's exclusive remedy is under the Workmen's Compensation Act, for the right to appeal is by statute only * * * and the only appeal given from an award of the Commission is by Sec. 56-972, A.C.A. 1939. * * *" 66 Ariz. at 72.

This latter statement is palpably a non sequitur. The right to appeal from an award of the Industrial Commission is, of course, given by statute exclusively to the Supreme Court; but respondent, as plaintiff in the superior court, was not attempting to appeal an award of the Commission. He was seeking to invoke a right of action guaranteed by the Constitution of Arizona, Article 18, § 6, supra. The Industrial Commission, by processing the claim under legislative acts, could not oust the jurisdiction granted to the superior court by Article 6, § 14 of the Constitution of Arizona to hear and determine respondent's case.

"Jurisdiction is the power to decide a case on its merits." Silver Corp. v. Bowen, 98 Ariz. 77, 402 P.2d 22. It is not dependent upon the unsuccessful assertion of a defense such as accord and satisfaction, contributory negligence, estoppel, failure of consider-

ation, fraud, laches, release, limitation of actions, waiver or election. These are defensive matters which, if found to be true, would defeat recovery on a plaintiff's right of action. It would be an absurdity, to which this Court would not for one moment listen, were it urged, for example, that contributory negligence, fraud, estoppel or laches could be raised by a motion to dismiss and decided by the trial judge without submission to a jury by the occult device of labeling the issue "jurisdictional."

In March, 1951, the United States Court of Appeals, Ninth Circuit, decided Taylor v. Hubbell, 188 F.2d 106. There, it seized upon the language of the Kress case, saying:

> "* * * And where allowance by the commission is the exclusive remedy of an injured workman the Arizona courts have no 'jurisdiction to hear' an action for damages. S. H. Kress & Co. v. Superior Court, 1947, 66 Ariz. 67, 182 P.2d 931, 934." 188 F.2d at 108

and concluded:

> "Being jurisdictional, these issues [as to whether there had been an election] were triable to the court not the jury." 188 F.2d at 109.

This error was perpetuated the following year in State ex rel. Industrial Commission v. Pressley, Nov. 1952, 74 Ariz. 412, 250 P.2d 992, wherein this Court quoted from and followed Taylor v. Hubbell without serious analysis.

Palpably, there is here no question of jurisdiction. The matter is as simple as this: If the jury determines the election against the plaintiff in the superior court, judgment should be entered in defendant's favor. The determination of whether the exclusive remedy is in the Commission is just another factual issue to be decided as all factual issues have been decided from time immemorial under the Anglo-American jury system.

I cannot acquiesce in this Court's disposition of the case. The language of the Kress decision, misapplied in Pressley and now stubbornly adhered to, whittles away at one of the most valuable

of constitutional rights so that now a workman of this state may not have a jury resolve this dispute with his employer.

I dissent.

FRED C. STRUCKMEYER, JR., Justice

CHARLES C. BERNSTEIN, Chief Justice

APPENDIX C

ROBERT D. MORGAN, Appellant,

v.

METRO-GOLDWYN-MAYER, INC., a Delaware corporation, Appellee.

No. 1 CA-CIV 746.

COURT OF APPEALS OF ARIZONA,

Division 1.

Department B.

Jan. 6, 1970.

Rehearing Denied Feb. 19, 1970.

Review Denied March 17, 1970.

Charles M. Brewer, Phoenix, for appellant.

Jenning, Strouss & Salmon, by Rex H. Moore, Rex E. Lee, Phoenix, for appellee.

Robert K. Park, Phoenix, for State Industrial Commission.

EUBANK, Presiding Judge.

This case is before this Court for the second time. It was originally here on appellant's petition for a writ of certiorari under Docket No. 1 CA-CIV 132, which was denied on April 19, 1965. Thereafter the Arizona Supreme Court granted the writ and rendered an extensive decision on the merits of the case, which decision, as we will point out, is dispositive of questions raised on this appeal. This prior decision is Morgan v. Hays and Metro-Goldwyn-Mayer, Inc. 102 Ariz. 150, 426 P.2d 647 (1967), cert. denied, 389 U.S. 859, 88 S.Ct. 105, 19 L.Ed.2d 125 (1967). It involves the same parties standing in the same capacity as they do in this matter and, upon analysis, involves the same legal issues.

In the prior decision Robert D. Morgan, hereinafter referred to as appellant, sued Metro-Goldwyn-Mayer, hereinafter referred to as MGM, his employer, in the Maricopa County Superior Court

for damages arising from his personal injuries which allegedly resulted from MGM's negligent conduct. MGM moved to dismiss the complaint alleging that the Superior Court lacked jurisdiction over the cause of action by reason of the appellant electing to take coverage under the State Workmen's Compensation Act by applying for and receiving compensation benefits. At the same time, MGM sought an order setting this motion for preliminary hearing to the trial court. The trial court granted the motion for the preliminary hearing and appellant petitioned the Supreme Court for a writ of certiorari, alleging that such a hearing deprived appellant of a jury trial on the fact issue of waiver. The writ was denied and the hearing was held, after which the trial judge advised counsel that he declined to rule on the jurisdictional question in advance of the jury trial. MGM then petitioned for a writ of mandamus in the Supreme Court requesting that the trial court be ordered to rule on the jurisdictional question immediately. The Supreme Court agreed with MGM and granted a preemptory writ ordering the trial court to rule, after which the trial court did rule and granted MGM's motion to dismiss for lack of jurisdiction. The trial court filed findings of fact and conclusions of law in support of its dismissal order concluding that appellant's exclusive remedy was vested either in the Industrial Accident Commission of the State of California, or the Industrial Commission of Arizona, and that the trial court had no jurisdiction over the matter.

Appellant then filed his notice of appeal but failed to file his cost bond, as required by Rule 73(b), Arizona Rules of Civil Procedure, and thereby failed to perfect his appeal. He then petitioned this court for a writ of certiorari, which was denied. The writ was subsequently granted by the State Supreme Court and the Morgan v. Hays decision, supra, resulting from that hearing. The Supreme Court, in its decision, affirmed the trial court's judgment of dismissal. For a discussion of that decision, see Skarecky, Workmen's Compensation—Election of Remedies—Question of Election is One of Law to be Decided by Trial Court.

Morgan v. Hays (Ariz. 1967), 9 Ariz. L. Rev. 543. In its opinion the Supreme Court based its affirmance on two grounds: First, that a question of election to take under the Workmen's Compensation statute is a preliminary question to be decided by the trial court prior to jury trial, which was properly disposed of by the trial court; and Second, that the findings of fact of the trial court, on the issue of appellant's waiver to sue MGM under A.R.S. Section 23-1024, were substantially supported by the evidence.

Following the issuance of the mandate, the appellant returned to the trial court and filed an amended and supplemental motion for new trial[1] under Rule 60(c), Rules of Civil Procedure, 16 A.R.S. This motion was considered and denied by the trial court and this present appeal results from the denial of that Rule 60(c) motion. A motion under Rule 60(c) is addressed to the discretion of the trial court and the result reached by that court will be sustained on appeal unless the record on appeal demonstrates a clear abuse of that discretion. Eldridge v. Jagger, 83 Ariz. 150, 317 P.2d 942 (1957); Haenichen v. Worthington, 9 Ariz. App. 83, 449 P.2d 319 (1969).

Appellant raises three questions on appeal: First, did the trial court abuse its discretion in denying plaintiff's motion for a new trial pursuant to Rule 60(c), Rules of Civil Procedure; Second, were the facts shown upon plaintiff's motion for new trial such as would probably have changed the result, should a new trial be granted; and, Third, was the appellant required to show due diligence in securing the facts and evidence relied upon in his motions for new trial?

MGM raises a preliminary question which must be disposed of prior to the consideration of the appellant's questions, that is, whether the appeal should be dismissed as moot because the prior judgment of the Arizona Supreme Court in Morgan v. Hays, supra, is now res judicata and dispositive of the rights of

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[1] Actually a motion to set aside the judgment

the parties in this case on the issue raised by the Rule 60(c) motion, i.e., fraud.

The effect of Rule 60(c) on a mandate from the Supreme Court was considered by Judge Molloy, speaking for Division Two of this Court in First National Bank of Arizona v. Otis Elevator Company, Inc., 8 Ariz. App. 291, 293, 445 P.2d 848 (1968), wherein he pointed out that a motion under 60(c) is as subject to the doctrine of res judicata as a new action would be. The same rule applies under Rule 60(b), Federal Rules of Civil Procedure, which is identical to Arizona Rule 60(c). In 7 Moore's Federal Practice, Sec. 60.30[2], p. 339, the federal rule is stated thus:

> "Where the appellate court has affirmed or reversed, then relief by the district court under 60(b) must reckon with the appellate court's mandate. 'The authorities seem uniform that a mandate from a reviewing court is controlling as to all matters within the compass of such mandate and as to such matters the District Court, after remand can take no further action.' (Citation omitted). At times a motion for relief *will not* raise matters that are within the compass of the mandate, (citation omitted) and in that event the district court clearly has the power to proceed with the 60(b) motion without leave of the appellate court. (Citation omitted)." (Emphasis supplied).

See also 3A Ohlinger's Federal Practice 418, 420 (Rev. Ed. 1964); Perrin v. Aluminum Co. of America, 197 F.2d 254 (9th Cir. 1952); City and County of Honolulu v. United States, 224 F.2d 573 (9th Cir. 1955).

The foregoing authorities require that the application of the doctrine of res judicata be applied in a Rule 60(c) motion where a mandate has issued from the Supreme Court, where the same parties are involved and where the same issues are raised. The exception according to Moore, supra, is where an issue is raised by the motion which does not raise matters within the compass of the mandate. See Restatement, Judgments, Section 70 (1942).

Appellant, in effect, claims that a new issue was raised primarily upon one ground alone—fraud. This fraud arises, he says, from the alleged forgery or fraud in procuring the initial Industrial Commission Form C-407 upon which the defense of waiver was sustained. This argument fails to fully examine the extent of the Supreme Court's decision and mandate in this case. The decision specifically cites Findings of Fact 29, 30, 31, 32 and concludes that, "* * * These findings of the court were substantially supported by the evidence. Under these circumstances we do not feel that the court erred in its conclusion that there had been a waiver. * * *" Those findings are set out in a footnote.[2] In addi-

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[2] "Following his admission to the hospital and on or about April 16, 1962, plaintiff sought and obtained the legal advice of the law firm of Snell & Wilmer, Phoenix, Arizona, and in particular, consulted with Mr. Frederick K. Steiner, Jr., a partner, and Donald Daughton, an associate of that law firm.

"30. On April 16 and again on April 19, 1962, when plaintiff was interviewed by said attorneys while in the hospital, he was lucid and responsive and was able to give an account of the accident and expressed a strong desire to sue his employer for what he believed was their negligence. He advised said attorneys that he had signed some document respecting Workmen's Compensation and that, among other things, said document provided that his benefits would be 65% of $1,000.00 per month.

"31. The plaintiff sought and received legal advice from said attorneys with respect to whether or not he had an option to sue his employer for damages; that he was advised by said attorneys that his sole and exclusive remedy was a claim against the Industrial Commisison of Arizona for Workmen's Compensation Benefits unless his employer failed to comply with the requirements of the Act in obtaining Workmen's Compensation Insurance, posting of notices or availability of rejection slips. Said attorneys advised him that he should accept Workmen's Compensation Benefits, said advice being given both orally and in writing.

"32. After consulting with said attorneys and on or about April 23, 1962, plaintiff executed or caused to be executed and filed with the Industrial Commission of Arizona a document entitled 'Workman's Report of Injuries and Application for Benefits.'"

The court went on to find that claims had been presented, and petitioner was paid compensation in a total sum of $4,795.41, and medical and hospital expense in the sum of $15,246.70. These findings of the court were substantially supported by the evidence. Under these circumstances we do not feel that the court erred in its conclusion that there had been

(Continued on Page A-29)

tion, findings Nos. 33, 34 and 35 made by the trial court in support of its conclusion of its lack of jurisdiction must be examined in the light of appellant's "new issue" allegation of fraud. They are as follows:

"33. Thereafter and on May 23, 1962; June 27, 1962; July 13, 1962; July 20, 1962; July 28, 1962; August 2, 1962; August 16, 1962; September 1, 1962; September 16, 1962; October 1, 1962; October 17, 1962; November 2, 1962; November 16, 1962; and December 2, 1962, plaintiff executed or caused to be executed documents entitled 'Workman's Supplemental Claim for Compensation' and filed or caused the filing of said documents with the Industrial Commission of Arizona, knowing and understanding that these were claims for Workmen's Compensation.

"34. The Industrial Commission of Arizona caused to be paid and plaintiff accepted Workmen's Compensation Benefits pursuant to each of the aforesaid 'Workman's Report of Injury and Application for Benefits' and 'Workman's Supplemental Claim for Compensation' under and pursuant to the provisions of the laws of the State of Arizona for the period from April 10, 1962, through November 16, 1962, in the total sum of $4,795.41.

"35. In addition to the aforesaid Workmen's Compensation Benefits, the Industrial Commission of Arizona paid or caused to be paid medical and hospital expenses of plaintiff in the sum of $15,246.70."

It is true, as appellant alleges, that the mandate quoted with approval the trial court's holding that appellant had made a

(Continued from Page A-28)

a waiver. Since the waiver alone is sufficient, it is not necessary for us to pass upon the other matters raised by the petitioner in regard to the jurisdiction of the court, and having decided this case upon its merits it is not necessary for us to pass upon the propriety or the timeliness of the filing of the writ of certiorari after the time for appeal has expired.

"Judgment affirmed." (at pp. 155-156 of 102 Ariz., at p. 652 of 426 P.2d.)

waiver under A.R.S. Section 23-1024 in these terms: "The plaintiff [appellant], by *making a claim* for Workmen's Compensation benefits and continuing to accept the same with full knowledge of his legal rights and with full knowledge of the legal conditions precedent to a suit against his employer, waived any right or option, if any, which he ever had to file any claim in this Court against his employer." (At p. 155 of 102 Ariz., at p. 652 of 426 P.2d). (Emphasis added). However, assuming actual fraud in the procurement of Form C-407, the initial application in "making a claim"—would this fact alone raise matters which would place appellant's motion outside of the compass of the mandate? We believe that it would not. The decision upon which the mandate is based goes far beyond "making" the initial form C-407 claim, and is based primarily upon appellant's personal knowledge, the legal advice he received, and his continued application for and acceptance of Workmen's Compensation benefits over an extended period of time and therefore if fraud existed initially, it is immaterial. The findings of fact set out herein sufficiently illustrate this point without further elaboration.

It is our opinion, therefore, that the allegation of fraud in the procurement of the original application by appellant does not raise a new issue outside of the compass of the Supreme Court's mandate, and, consequently, the doctrine of res judicata applies in this case to the issue of waiver.

Returning to appellant's first question on appeal, it is clear that under the compass of the Supreme Court's mandate that the trial court did not abuse its discretion in denying the Rule 60(c) motion. It is equally clear that his second question—that the facts shown would probably have changed the result if a new trial were granted—is not supported by the record. Finally, appellant's third question, concerning his due diligence in securing the facts and evidence relied upon for his motion, need not be considered for it adds nothing one way or the other to the disposition of this matter.

The judgment of the trial court is affirmed.

HAIRE and JACOBSON, JJ., concur.

APPENDIX D

PRETRIAL ORDER

A Pretrial conference was held in the above-captioned cause on the 26th day of May, 1964, at 9:30 o'clock a.m. with the following counsel present before the Honorable Jack D. H. Hays, Judge of the above-entitled court, Division 6:

Mr. Charles M. Brewer representing the plaintiff for Messrs. Raoul D. Magana and Charles M. Brewer, attorneys at law.

Mr. Rex H. Moore representing Metro-Goldwyn-Mayer, Inc., for Messrs. Jennings, Strouss, Salmon and Trask, Attorneys at Law.

Mr. Richard J. Daniels, Chief Counsel of the Industrial Commission of Arizona, representing said Industrial Commission and Metro-Goldwyn, Mayer, Inc.

Oral argument was heard on plaintiff's objections to interrogatories and on legal issues regarding defendant's motion to dismiss for lack of jurisdiction. The Court took all of said matters under advisement. Thereafter, Pretrial Conference was continued to May 27, 1964, at 1:30 o'clock p.m. with the same counsel present and, in addition, Mr. William Jones was also present on behalf of the defendant.

IT IS ORDERED that the Preliminary Hearing [heretofore set for June 10, 1964, on the question of defendant's Motion to Dismiss for want of jurisdiction was to proceed to hearing] at that time without a jury.

The Court further indicated that the question of jurisdiction was not to be considered by the jury, and that in the event the Court denied the defendant's motion to dismiss for lack of jurisdiction, the sole issues to be presented to a jury on June 15, 1964, or as soon thereafter as it could be heard, depending on the length of the Preliminary Hearing, were the issues in a normal negligence case. *In other words, the Court would make a determination as to all issues of jurisdiction, election, waiver and other such related matters.*

IT IS ORDERED that the burden of proof at the Preliminary Hearing proceedings on defendant's motion to dismiss for lack of jurisdiction shall be the burden of the defendant.

The Court having heretofore overruled plaintiff's objections to defendant's interrogatories, plaintiff was granted leave to file interrogatories directed to the defendant, and the defendant filed supplemental interrogatories.

IT IS ORDERED that all answers to interrogatories must be filed not later than June 5, 1964.

A general discussion of exhibits to be presented was had, and IT IS ORDERED that all exhibits to be presented at the Preliminary Hearing or at the jury trial must be made available for examination by opposing counsel prior to June 9, 1964.

IT IS FURTHER ORDERED that only exception to the foregoing are exhibits which may be presented for purposes of impeachment.

No amendments were proposed at the Pretrial Hearing.

s Jack D. H. Hays
Judge

Copies mailed
to counsel of record.

APPENDIX E-1

AMENDED AND SUPPLEMENTAL MOTION FOR NEW TRIAL ON GROUNDS OF NEWLY DISCOVERED EVIDENCE, FRAUD, OTHER SUBSTANTIAL REASONS JUSTIFYING RELIEF

(Extended Oral Argument Requested)

Pursuant to Supreme Court order in cause number 8653, plaintiff moves the Court to set aside the judgment in the above entitled action, dated January 5, 1965, and to grant a new trial pursuant to amended Rule 60(c), Arizona Rules of Civil Procedure, for the following reasons:

1. NEWLY DISCOVERED EVIDENCE.
2. FRAUD.
3. JUDGMENT IS VOID.
4. OTHER SUBSTANTIAL REASONS JUSTIFYING RELIEF, WHEREBY THE PLAINTIFF WAS DENIED A FAIR AND IMPARTIAL TRIAL IN THAT:

A. His signature was *forged* to the Arizona Industrial Commission Acceptance of Benefits Form No. 407 "Waiver," or was not affixed thereto by him knowingly and of his own free will.

(See the affidavit of noted criminologist and examiner of questioned documents, Dr. Paul Kirk.)

B. Industrial Commission Investigator Glenn Jurgemeyer, who purportedly obtained the "Waiver" admitted to Mark Wilmer, Charles Brewer, James D. Lester, and Elmer Snow, that he "did not obtain the Waiver from Morgan" as claimed by defendant.

(See affidavits.)

C. That Jurgemeyer, a witness material to petitioner's case, was purposely instructed by the defendant to hide out of Maricopa County under an assumed name from service of process, and caused said material witness Jurgemeyer to avoid service of process by petitioner.

(See affidavits and sworn statements.)

D. That Jurgemeyer did purposely avoid service of process knowing that the petitioner was about to serve him.

(See affidavits of Attorney for the Industrial Commission C. E. Singer, sworn statements of Industrial Commission Investigator Jack Newman, affidavit of Industrial Commission Investigator Archie Tufts, and Elmer Snow, former Chief Investigator for the Arizona Industrial Commission.)

E. That defendant Metro-Goldwyn-Mayer's auditor, Robert Foss, at the time of the preliminary hearing, gave false testimony to material facts which were completely at variance with a written statement wherein he stated to defendant Metro-Goldwyn-Mayer through said defendant's insurance company representative Tom Malone shortly after the filing of plaintiff's complaint that defendant *did not* have rejection slips available (as required by A.R.S. §23-906(e), and couldn't swear as to the posting of signs. However, at the hearing Foss emphatically testified that signs were posted and that he had rejection slips available. (See partial transcript of record attached hereto.)

F. That plaintiff's counsel has recently been advised by counsel for the Industrial Commission that Jurgemeyer, if allowed to testify would testify that not only was he hidden from service of process to avoid testifying but that if he did testify he would swear under oath that there were no workman's compensation signs posted on the job site at any time prior to petitioner's injury.

(See affidavit of Attorney Charles M. Brewer.)

G. That only after plaintiff's filing April 12, 1965, of his 60(c) Motion for Fraud, etc., Jurgemeyer, for the first time, in a statement to the County Attorney's office, on April 22, 1965, changed his position and claimed he "now" obtained the Form 407 "Waiver." In said statement Jurgemeyer asserted that he did obtain the "Waiver" on the 23rd day of April, 1962, stating that he did so at 10:30 A.M., in the presence of Nurse Krouse, and that Morgan was rational, lucid, amiable and chatted freely

with him about lawsuits, negligence, etc.—this purported claim is dirametically [sic] opposed to affidavits by the physicians and nurse attending Morgan at 10:30 A.M. on April 23, 1962, the hospital notes, nurses' notes, doctors' notes, hospital records and prior statements by Jurgemeyer. The attached affidavits of Doctors Willard S. Hunter and Paul B. Jarrett, coupled with that of registered nurse Eunice Krouse, emphatically show, but not limited to the following:

1. That Jurgemeyer was never in Morgan's room on that date.
2. That Morgan was physically incapable of signing anything on that date.
3. That Morgan was mentally incapable of signing anything on that date.
4. That because of his position on a fracture bed and the fact that his right eye was sewn shut and that he had toxemia, bacteremia and septicemia and a necrotic sacrum, perineum and left leg, (which necessitated amputation) and that the right leg was raised in traction, all rendered Morgan too weak to even feed himself.
5. That he was given 325 milligrams of Demerol that day in four separate shots prior to the operation the afternoon of the 23rd day of April, 1962.

(See affidavits of Dr. Hunter, Dr. Jarrett, Nurse Eunice Krouse, attached hereto, incorporated herein and made a part hereof.)

H. That the affidavit of Nurse Krouse states that a claims investigator for the Industrial Commission attempted to have her testify at the preliminary hearing that Morgan was lucid and rational on or about the 23rd day of April, 1962, and that if she would so state, they would pay her *compensation* from the Industrial Commission of Arizona for so stating. This is further substantiated by the confidential memorandum from Chief Spe-

cial Agent Thomas L. Hall to Chief Counsel Richard J. Daniels dated October 30, 1964.

(Attached hereto)

I. That Jurgemeyer, the "now purported obtainer of the Waiver," impeached former Industrial Commission Attorney Richard J. Daniels and Head Claims Examiner Aaron Nelson by admitting the following:

"I told him of the previous evening activity and told him that in all probability this had something to do with the Morgan trial and asked for instructions. He said that he would attempt to get in touch with Mr. Daniels, Chief Counsel and that I should call him in 30 minutes. I then went to the vicinity of 3rd Street and Portland, where I anticipated I would see a fellow worker, Bill Sawyer. Mr. Sawyer did in fact appear shortly thereafter; he recognized me and stopped. We had a brief conversation and decided to go to the Los Olivas Restaurant for coffee. *At that time, I told him that someone was looking for me the previous evening and in all probability it had to do with the Morgan case.* He then left to go to the office and I told him that I had to call Mr. Nelson. We parted. I then proceeded to the Porterhouse Motel 15th Avenue and Grand. Upon arriving at the Porterhouse I again called Mr. Nelson, this was as I recall about 8:00 or 8:15 A.M. Mr. Nelson stated that he talked to Mr. Daniels and Mr. Daniels instructions were that, for the best interest of the Commission, I should proceed to take the trip to Casa Grande and vicinity. Without hanging up Mr. Sawyer came on the phone and stated that he would bring the Casa Grande trip files to me at the Porterhouse, which he did shortly thereafter. After having coffee with Mr. Sawyer, I went back to my home, picked up my suitcase and proceeded to Florence.

I worked claims in Florence, Coolidge, and Casa Grande. That evening I went to Francisco Grande Hotel out of Casa Grande *and registered under an assumed name.* The next morning about 11:00 AM I called Mr. Nelson from a pay

phone at a service station at the east end of Casa Grande where 2nd Street makes an S turn onto the highway to Eloy. Our secretary answered with a comment, *as I recall "All is forgiven, please come home." I then talked to Mr. Nelson, who stated that the trial of Morgan vs. M.G.M. had been completed."*

(Page 3-4 of Jurgemeyer's affidavit 5/4/67)

That plaintiff was ignorant of the existence of said evidence at the time of the preliminary hearing herein, and that while said evidence existed at that time, plaintiff could not have sooner discovered said evidence in the exercise of due diligence. Said evidence is not merely cumulative or impeaching in character, but is material and of such character and nature that if produced at the trial, it would probably have resulted in a different verdict. Because of the secreting of material witness Jurgemeyer, of which plaintiff's counsel was first advised on March 15, 1965, by attorney of record, Richard J. Daniels, plaintiff employed Dr. Kirk, examiner of questioned documents, to examine plaintiff's purported signature on said Form 407 "Waiver." That as a result of Dr. Kirk's findings of forgery or assisted handwriting, plaintiff's counsel reported said variance to the County Attorney's office, who conducted an investigation and that said investigation revealed the pertinent information contained herein which was unavailable to the plaintiff and while said evidence existed at the time of the preliminary hearing, plaintiff could not have sooner discovered said evidence in the exercise of due diligence.

Respectfully submitted,

[Signature of Charles M. Brewer,
Counsel for plaintiff]

FORM C 407-50M-10-58

Claim No. 5

WORKMAN'S REPORT OF INJURY

And Application for Benefits

USE INK OR TYPEWRITER

TO BE SENT TO
THE INDUSTRIAL COMMISSION OF ARIZONA
PHOENIX, ARIZONA

ANSWER ALL QUESTIONS FULLY

"If to obtain any compensation * * * any person wilfully makes a false statement or representation, he shall be guilty of a misdemeanor, and * * * shall forfeit all right to such compensation * * * after conviction for such offense."—Excerpt from Workmen's Compensation Law.

1. **Employer's name** Utah Construction Company
2. Employer's address 1202 Warley Bldg Black Canyon City Ariz
3. Did your employer have three or more employees at the time of injury? yes
4. **Claimant's name** Robert D. Morgan
5. Address 3160 Colorado Canyon Park Kingman Ariz
6. Social Security No. 572-12-2865 Date of birth 10-3-25 Married X Single
7. Occupation when injured Steelman Were you hired for steady work yes
8. Days worked per week at time of injury (5, 5½, 6, 6½, 7) 6 Hours worked 7:45 am to 6:30 pm
9. Daily wage at time of injury $ 4.36 per hr Hourly wage at time of injury $
10. Time, piece, contract or commission worker time
11. Wages earned from employer during 30 days immediately prior to injury $
12. Did you receive board or lodging in addition to your wage? Value $
13. On reverse side of this form list all employers for year immediately preceding injury date.
14. **Present Injury**—Date sustained April 9-1962 Hour of day 1:00 P m
15. Did you stop work immediately? yes If not, last day worked last ant
16. Date of return to work Wages on return
17. When did you report injury? 4-9-62 To whom? first aid man
18. Give names of at least two material witnesses (if none so state):
    Name unknown Address
    Name Address
19. Where did accident occur? Wagner R.R. trestle Kingman Ariz
20. Name of machine, tool or appliance in connection with which accident occurred Pickup car
21. Was accident caused by another person? If so, by whom?
22. STATE FULLY how accident occurred and describe nature and extent of injury Mr Morgan was employed by defendant on a railroad car fell from the back of the car, and that car passed over & skin, crushed, injured to both legs, head, eye and multiple bruises lacerations of
23. What physician attended you? Doctor Wade Steelman When? 5-APR-25
24. Address of physician To what hospital sent?
25. Names, ages, address and relation of persons totally dependent on you at time of injury
    Eugene Morgan 3 children
26. Do any of such persons work or depend upon any one else or have other source of support?
27. Have you ever received any other injury? no If so, when? Where?
28. What was its nature?
29. Are you receiving disability compensation from any source? no
30. If so, from whom For what reason

PAYMENT APPROVED BY

By this instrument, I make application for benefits to which I may be entitled under the law; and I hereby affirm that all the above statements are true.

Date of signing 4-23-62 **(Sign here)** Robert D. Morgan

NOTE—Kindly write on the back of this sheet any further information, details, or explanations of your answers to the above questions, which will assist the Commission in passing upon your claim.

Kindly send further forms

APPENDIX E-3

AFFIDAVIT OF PAUL L. KIRK

STATE OF CALIFORNIA)
) ss.
County of Alameda)

PAUL L. KIRK, being first duly sworn upon his oath, deposes and says:

I graduated from Ohio State University in 1924, and received my Master of Science degree from the University of Pittsburgh in 1925, and received my Doctor of Philosophy from the University of California in 1927, wherein I have been teaching since 1929. In 1937, I began teaching criminalistics to date, and in conjunction therewith, I have worked as a consultant on questioned documents and handwriting since 1939; I have written several papers and portions of books regarding various aspects of questioned document examination, and in my instruction as a teaching professor in the Department of Criminology at the University of California I teach and direct research in several aspects of document examination. Since 1939 I have testified and investigated several hundred cases throughout the United States in both criminal and civil matters, including examinations of questioned documents for the United States Army, United States Air Force, California State Crime Commission, Internal Revenue Service, and numerous and sundry banks and insurance companies. In addition, I belong to the various technical societies: American Association for the Advancement of Science, American Chemical Society, American Society of Biological Chemists, American Society of Criminology, California Association of Criminalists (charter member), International Association of Forensic Toxicologists (charter member), Austrian Microchemical Society (honorary member), American Institute of Chemists (honorary fellow), New York Academy of Science (honorary fellow), Koninklejke Vlaamse Academie Voore Wetenschappen, Lettern En Schone, Kunsten Van Belgie (honorary fellow).

That on or about the 17th day of March, 1965, I was requested by attorney Charles M. Brewer of Phoenix, Arizona to examine a document which is an Exhibit in the above captioned case, more specifically known as Workman's Report of Injury and Application for Benefits to the Arizona Industrial Commission of Arizona, Form C-407. That on April 1, 1965, I came to Phoenix, Arizona in order to study the original document in question, in the Records Room of the Maricopa County Court House. I made an examination of this document, and I have also examined numerous and sundry other samples of the handwriting of Robert D. Morgan, written on various occasions, to obtain the characteristics of his signature.

That I am of the opinion that the signature at the bottom of the application for benefits purporting to be that of Robert D. Morgan, contains certain variances strongly indicating that this was not his spontaneous writing. The handwriting characteristics and the stroke of the pen are inconsistent with that of Robert D. Morgan, in that I examined this original document with the aid of instruments brought from my laboratory coupled with the assistance of a high-powered microscope which reveals that the signature is not characteristic of his writing, and that there is strong evidence existing showing an abnormal and non-spontaneous writing.

It is my opinion that the signature on the original Form C-407, in the above captioned case, deviates in serious ways from the handwriting of that of Robert D. Morgan, and these deviations are consistent only with the direct intervention by another person who guided the hand of Robert D. Morgan, or alternatively, did the writing independently without any participation by Mr. Morgan.

/s Paul L. Kirk
Paul L. Kirk

APPENDIX E-1

Portion of Recorded Interview

* * * * *

MR. WILMER: Did you see Morgan in the hospital?

MR. JURGEMEYER: No.

* * * * *

MR. BREWER: *Then the MGM man could have gotten it?*

MR. SNOW: I don't know how that was handled out there, really. When I went on location I always saw that they had all kinds of forms.

MR. JURGEMEYER: He was pretty skilled with the basic requirements of the Commission so —

* * * * *

MR. Wilmer: Well let me ask you this:

It says: "Contacted claimant and obtained form 407."

This would apepar, at least, to be the report that someone had contacted the man and gotten the 407?

MR. JURGEMEYER: *Probably I don't know. I don't know anything about it.*

APPENDIX E-5

(Portion of Affidavit of Dr. Willard S. Hunter.)

* * * * *

That I observed Morgan at 9:00 a.m. and again at 10:30 a.m. on the 23rd because of the condition of his leg and the necessity of removing the toxic material which he was absorbing. At 10:30 a.m. I removed the wire sutures from his leg. That I did not see any claims investigator or any other person in or near Morgan at those times heretofore stated, and that I spent at least 15 to 20 minutes on each of these occasions attending Mr. Morgan. *That I, being the attending physician, did instructed the special duty nurses not to let Mr. Morgan be interviewed by anyone or attempt to sign anything of any nature or kind because of his precarious physical condition. From the 15th of April to the 23 of April Morgan was showing signs of increased toxicity. I am of the opinion that he wasn't lucid nor rational from five or six days after he came to the hospital (April 9, 1962) until long after the amputation of his leg. That Morgan was constantly under narcotics and drugs forsooth. I am of the opinion that the large amounts of demerol given Mr. Morgan helped place him in a state of mind of being completely dull and not knowing what was going on. I am of the opinion that Mr. Morgan wasn't able at any time from the 15th of April 1962 until the 24th of April, 1962 to know what he was signing and further, that on the 23rd of April he wasn't physically capable of signing anything because of his position in a fracture bed; and further, that he was weakened with toxemia, bacteremia and septicema to such a state that he wasn't able to feed himself nor physically rise out of the bed.*

FURTHER AFFIANT SAYETH NOT.

s/ Willard S. Hunter, M.D.
Willard S. Hunter

APPENDIX E-6

ICA MEMO TO
BRIBE NURSE

Form G-502-A 10M 10-63

MEMORANDUM

CONFIDENTIAL

DATE: October 30, 1964

RE: Eunice J. Krouse
Claim Nos. AZ 11555 &
AZ 31202

TO: Richard J. Daniels, Chief Counsel

FROM: Thomas L. Hall, Chief Special Agent

These are two similar cases involving two different findings by the Commission.

The nature of the injuries is the same — staph-infection. *The problem is: Why did we accept one and deny the other?*

Background:

This nurse is one of those involved in the R. M. Morgan (MGM) case. She had admitted upon interview that she had signed his C413's in that case. At the same interview I recall that she complained of the amount of compensation paid to her (1st injury). This latter information was apparently relayed to the claims department and she was paid $310.29 total in compensation and $84.00 in medical.

The second case was denied and timely protested. In both cases the County Hospital has declined to admit that Krouse was an employee.

Generally, it is felt by the undersigned, that in view of the fact that we accepted and paid the first claim, that we should also pay the second.

Confidentially, it was believed that at the time of the Morgan case that her testimony would be of great value. However, it was decided that it was not to be used, apparently, as I have no

further personal knowledge of the case. *I think that compensation was paid on the original case in order to put her in a more cooperative frame of mind.*

s/ Thomas L. Hall
Thomas L. Hall
Chief Special Agent

TLH: ew

APPENDIX E-

AFFIDAVIT

STATE OF ARIZONA)
COUNTY OF MARICOPA) SS

EUNICE J. KROUSE, being first duly sworn, on oath deposes and says:

That I reside at 2829 West Palo Verde Drive, that I have been a registered nurse since 1931 and have practiced for the past twenty-two years in the State of Arizona; that I attended Mr. Robert D. Morgan on the day shift for four months. That my duties as special duty nurse to Mr. Morgan started on April 16, 1962 and continuously remained with him for four months. That I have reviewed my nurses notes and that it is my opinion *that on April 23, 1962 Morgan could not sign his name to any paper because of the severity of his injuries and his toxic condition.* That it was necessary to refrain all student nurses from coming into his room and it was frequently necessary to request the help of male orderlies; that from the time that I first started caring for him until long after the amputation of his leg on May 5, 1962, he was on massive doses of narcotics and tranquilizers. That Mr. Morgan on the 23rd of April, 1962 wasn't able to turn or move because of his weakened condition and also being confined to a fracture bed. That Mr. Morgan was in such a confused state of mind that he would frequently attempt to call the President of the United States and numerous professional golf playing friends of his, until we had to remove the phone from his room.

From my long years of nursing I am of the opinion that Mr. Morgan wasn't rational nor lucid nor able to make any decisions to determine his legal rights from the 16th day of April, 1962 until long after the amputation of his leg on May 5, 1962. During this period of time he was constantly complaining of pain, requesting narcotics and necessitating constant medical attention. The right side of his face was open and infected necessitating hot packs, that his head was lacerated and he was literally scalped.

His left leg had loss of much bone, and was gangrenous and necessitated being left open because of the massive infection and deterioration thereof. That Drs. Johnson, Hunter and Jarrett attended him daily attempting to cut away the putrified flesh and maintain a balance of his electrolite system by the use of steroids. That Mr. Morgan was in extremely poor condition from April 16 to May 5, 1962, that he was suffering from toxcemia, bacterima, and septicima. That he had an extensive wound on the sacrum and perineum with a compound fracture of the sacrum which turned the sacrum to his right and a large flap was open. He also had an extensive soft tissue wound which involved the rectum and anus and some of the sacral nerves on the right side. There had been a large foreign body removed from this area which was taken by the doctors to be a piece of railroad tie embeded in the peri-rectoral area; that he had compound fractures in both of his legs with extensive lacerations about the face and scalp; that his right eye was sutured shut. That on the 23rd day of April, 1962 it was obvious that Mr. Morgan had necrotic tissue which had been killed by bacteria in the area of the perineum and in the left leg. That his condition was very grave and very poor, and that his perineum and sacrum area was severly lacerated and needed constant packing and debridment of dead flesh; that Mr. Morgan was unable to have bowel movements which I, by necessity, had to extricate by hand from his colon which was exposed.

That I had been instructed by the doctors to keep track of everyone who came into the room and to not allow any claims adjusters or investigators to visit with Morgan because of his obvious toxic condition. That Mr. Morgan could not control nor physically hold a fountain pen nor write on and subsequent to April 23, 1962. That it was necessary for me to feed him because of his weakened condition and his inability to feed himself. That Mr. Morgan was on massive doses of steroids and that he was quite irrational prior to and on the 23rd day of April, 1962. That he could not sign cards or notes, nor write, and it was only

long after the amputation of his leg on May 5, 1962, that I would assist him to write his name. *I was reminded by Dr. Clare Johnson, Mr. Morgan's plastic surgeon, to make notes of any gifts or anyone coming into the room; that I know that no claims examiner or investigator for the Industrial Commission of Arizona came into Morgan's room on the 23 day of April, 1962, nor was I approached by one Glen Jurgemeyer purporting to be a claims investigator of the Industrial Commission of Arizona. That Mr. Morgan, prior to the amputation of his leg, was being attended by a psychiatrist,* that it was necessary for us to sign the 413 claim forms in order for the doctors to be paid. *That there was never a Form 407 nor any type of waiver form ever left with Mr. Morgan by anyone regarding the receipt of benefits from the Industrial Commission of Arizona.*

That on or near the First of June, 1964, just prior to the preliminary hearing regarding Robert Morgan's suit against Metro-Goldwyn-Mayer, an investigator from the Arizona Industrial Commission came to my house ostensively to discuss compensation regarding a staphylococcus infection that I received at a hospital, *and intimated that if I would cooperate with these investigators that Mr. Morgan was lucid and rational at or near the time he was supopsed to have executed an acceptance of of benefits and waiver form, that they would assist in approving my claim with the Industrial Commission of Arizona and expedite same.*

That my husband was also present and when he heard these investigators of the Arizona Industrial Commission try to change my opinion regarding Mr. Morgan's toxicity and irrationality he became irate and ordered them off our property.

That during Mr. Morgan's entire hospitalization he constantly spoke of and raved of the negligence of the individual operating the logs that fell upon him, this individual to the best of my knowledge was the son of the vice-president of Metro-Goldwyn-Mayer, and *that Morgan was highly incensed because of the way the accident happened and continuously spoke of filing a*

law suit against Metro-Goldwyn-Mayer and claimed it was his intentions as soon as he got out of the hospital to sue Metro-Goldwyn-Mayer for the negligence of their vice-president's son.

FURTHER AFFIANT SAYETH NOT.

s/ Eunice J. Krouse
EUNICE J. KROUSE

APPENDIX E-8

(Portion of Affidavit of Industrial Commission of Arizona chief referee)

* * * * * *

At approximately the middle of March, 1965, affiant had a conversation with Industrial Commission Claims Investigator Glenn E. Jurgemeyer concerning his part in the investigation in connection with the claim of one Robert D. Morgan v. Metro-Goldwyn-Mayer, Inc. and The Industrial Commission of Arizona. This conversation took place in my Commission office at 1616 West Adams Street, Phoenix, Arizona, and at that time Elmer E. Snow, a former Claims Reviewer for The Industrial Commissioner was also present. Mr. Jurgemeyer related to Mr. Snow and myself that he, Jurgemeyer, had been instructed to avoid process of service and to remain out of sight to avoid being subpoenaed to testify in the preliminary hearing of Morgan v. M.G.M.

Jurgemeyer further stated that on his return home one day during the pendency of said hearing, he observed an automobile parked in front of his residence, and that he suspected it was a process server. That he entered his house through the rear entrance and called his immediate superior, Aaron Nelson, for instructions; that Mr. Nelson advised Mr. Jurgemeyer that he would call Richard J. Daniels, then Chief Counsel for the Industrial Commission of Arizona, to ascertain what counsel desired him to do; *that instructions given by Chief Counsel, Richard J. Daniels, were that Mr. Jurgemeyer* was to remain out of sight and or leave town *to avoid being served with process of service and to avoid said process at all costs.*

/s C. E. Singer, Jr.
C. E. SINGER, JR.

APPENDIX E-9

(Portion of interoffice memorandum of Jurgemeyer to chief counsel)

At that time, I told him that someone was looking for me the previous evening and in all probability it had to do with the Morgan case. He then left to go to the office and I told him that I had to call Mr. Nelson. We parted. I then proceeded to the Porterhouse Motel 15th Avenue and Grand. Upon arriving at the Porterhouse I again called Mr. Nelson, this was as I recall about 8:00 or 8:15 AM. *Mr. Nelson stated that he talked to Mr. Daniels and Mr. Daniels instructions were that, for the best interest of the Commission, I should proceed to take a trip to Casa Grande and vicinity.* Without hanging up Mr. Sawyer came on the phone, and stated that he would bring the Casa Grande trip files to me at the Porterhouse, which he did shortly thereafter.

Page 4 May 4, 1967

To: Mr. Robert K. Park, Chief Counsel

After having coffee with Mr. Sawyer, I went back to my home, picked up my suitcase and proceeded to Florence.

I worked claims in Florence, Coolidge, and Casa Grande. That evening I went to Francisco Grande Hotel out of Casa Grande and registered under an assumed name. The next morning about 11:00 AM I called Mr. Nelson from a pay phone at a service station at the east end of Casa Grande where 2nd Street makes an S turn onto the highway to Eloy. Our secretary answered with a comment, as I recall *"All is forgiven, please come home"*. *I then talked to Mr. Nelson, who stated that the trial of Morgan vs. M.G.M. had been completed.* I told him that I had to work through Wednesday in the Casa Grande area.

APPENDIX F-1

UNITED STATES CONSTITUTION
AMENDMENT VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX F-2

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F-3

ARTICLE 2 § 23. Constitution of Arizona

Section 23. The right of trial by jury shall remain inviolate, but provision may be made by law for a jury of a number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of a jury in civil cases where the consent of the parties interested is given thereto.

APPENDIX F-4

ARTICLE 18 § 6, Constitution of Arizona

Section 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

APPENDIX F-5

ARTICLE 18 § 8 Constitution of Arizona

Section 8. The Legislature shall enact a Workmen's Compensation Law applicable to workmen engaged in manual or mechanical labor in all public employment whether of the State, or any political sub-division or municipality thereof as may be defined by law and in such private ~~employments as the Legislature~~ may prescribe *by which compensation shall be required to be paid to any such workman,* in case of his injury and to his dependents, as defined by law, in case of his death, by his employer, if in the course of such employment personal injury to or death of any such workman from any accident arising out of and in the course of, such employment, is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or ~~a necessary risk or~~ danger inherent in the nature thereof, *or by failure of such employer, or any of his or its agents* or *employee or employees to exercise due care, or to comply with any law affecting such employment; provided that it shall be optional* with any employee engaged in any such private employment to settle for such compensation, or to retain the right *to sue said employer as provided by this Constitution;* * * *

APPENDIX F-6

§ 23-906. LIABILITY UNDER CHAPTER OR UNDER COMMON LAW OF EMPLOYER SECURING COMPENSATION; RIGHT OF EMPLOYEE TO MAKE ELECTION; PROCEDURE FOR MAKING ELECTION

A. Employers who comply with the provisions of § 23-961 as to securing compensation shall not be liable for damages at common law or by statute, except as provided in this section, for injury or death of an employee wherever occurring, but it shall be optional with employees to accept compensation as provided by this chapter or to reject the provisions of this chapter and retain the right to sue the employer as provided by law.

B. The employee's election to reject the provisions of this chapter shall be made by a notice in writing, signed and dated by him and given to his employer, in duplicate in substantially the following form: "To (name of employer):

You are hereby notified that the undersigned elects to reject the terms, conditions and provisions of the law for the payment of compensation, as provided by the compulsory compensation law of the state of Arizona, and acts amendatory thereto."

C. The notice shall be filed with the employer prior to injuries sustained by the employee, and thereafter within five days the employer shall file with the commission the duplicate of the notice so served by the employee. All employees shall be conclusively presumed to have elected to take compensation in accordance with the terms, conditions and provisions of this chapter unless the notice in writing has been served by the employee upon his employer prior to injury.

D. Every employer engaged in the occupations designated in this chapter shall post and keep posted in a conspicuous place upon his premises, in all languages spoken by his employees and available for inspection by all workmen, a notice in substantially the following form:

"All employees are hereby notified that in the event they do not specifically reject the provisions of the compulsory compensation law they are deemed by the laws of Arizona to have accepted the provisions of such law, and to have elected to accept compensation under the terms of such law, and that under the terms thereof employees have the right to reject the same by written notice thereof prior to any injury sustained, and that blanks and forms for such notice are available to all employees at the office of this company."

E. If an employer fails to post and keep posted the notice as required by this section, or fails to keep available at the place where the employees are hired the blank forms of notice to be signed by the employee, no employee who thereafter engages in employment for such employer, during the time that the notices are not posted or during the time that the blanks are not available, shall be deemed to have accepted the provisions of this chapter, and it shall be optional for such employee, if injured during the period when blanks were not available or the notice was not posted, to accept compensation under the provisions of this chapter or maintain other action against the employer.

APPENDIX F-7

§ 23-1061 A.R.S. Application for Compensation.

A. An employee entitled to compensation shall file with the commission an application therefor together with the certificate of the physician who attended him. The physician *shall inform* the *injured employee of his rights under this chapter and shall give all necessary* assistance in making the application for compensation and such proof as required by the rules of the commission without charge.

APPENDIX F-8

RULE 60(c) ARIZONA RULES OF CIVIL PROCEDURE

60(c) Mistake; inadvertence; surprise; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant served by publication as provided by Rule 59(j) or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. Amended July 14, 1961. Effective on and after midnight Oct. 31, 1961.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. ———

ROBERT D. MORGAN,

Petitioner,

vs.

METRO-GOLDWYN-MAYER, INC.,
a Delaware corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF
THE STATE OF ARIZONA

STEWART L. UDALL
1700 Pennsylvania Avenue
Washington, D.C. 20006
Attorney for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. ———

ROBERT D. MORGAN,

Petitioner,

vs.

METRO-GOLDWYN-MAYER, INC.,
a Delaware corporation,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeals of Arizona, entered in the above entitled case January 6, 1970.

CITATIONS TO OPINIONS BELOW

The opinion and decision of the Court of Appeals of Arizona, Division One, Dept. B, rendered January 6, 1970 affirming the Arizona Superior Court's order denying Plaintiff's Motion for new trial entered on July 25, 1967 is reported at 11 Ariz. App. 223, 463 P.2d 118, and is reproduced in Appendix C hereto (App. A-24).

The decision and dissent in *Morgan v. Hays* of the Supreme Court of Arizona in certiorari proceedings rendered April 12, 1967, is reported at 102 Ariz. 150, 426 P.2d 647, and is reproduced in Appendix B hereto (App. A-3).

JURISDICTION

The Judgment and decision of the Arizona Court of Appeals, Division One, Dept. B, was entered on January 6, 1970. Rehearing was denied on February 19, 1970. Petition for Review was denied March 17, 1970 by the Arizona Supreme Court.

This Court's order signed by Mr. Justice Stewart granted an extension of time within which to petition this Court for certiorari to and including August 13, 1970.

The jurisdiction of this Court is invoked by reason of the provisions of Title 28 United States Code § 1257(3).

QUESTIONS PRESENTED

1. Where a state court has been ousted of Jurisdiction and an injured workman denied the right to a jury trial by means of fraud conceived and perpetrated by the chief counsel of the Industrial Commission of Arizona and its subordinate employees, does the Seventh and Fourteenth Amendments of the Constitution of the United States become applicable to the States in order to protect this fundamental right, essential to a fair trial on the issues of fraud, election of remedies and waiver of said workman's right to sue his employer at common law to recover damages under Article 18 § 8 Arizona Constitution and A.R.S. § 23-906 D. and E?

2. Does the Due Process Clause of the Fourteenth Amendment protect the right to a jury trial guaranteed by the Seventh Amendment in a civil case involving substantial property rights which otherwise would be destroyed without a trial because of the refusal of the state courts to accept jurisdiction?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions which are involved will be set forth verbatim in Appendix F-1 through F-8 inclusive (App. A-52-56).

The Seventh and Fourteenth Amendments to the Constitution of the United States (App. A-52), Constitution of Arizona, Article 18 § 8 (App. A-53), Article 18 § 6 (App. A-53), Article 2 § 23 (App. A-52), A.R.S. § 23-906 (App. A-54-55), A.R.S. § 23-1061A (App. A-55), Rule 60(c) A.R.C.P. 16 A.R.S. (App. A-56).

STATEMENT OF THE CASE

Robert D. Morgan, petitioner, was employed by Metro-Goldwyn-Mayer, Inc., (hereinafter referred to as "M-G-M") prior to April 9, 1962, as a stunt man in the filming of the movie, "How the West Was Won." On location near Superior, Arizona on that day, while in discharge of his duties, he was knocked under the wheels of a railroad car due to the reckless conduct of an assistant director, as a result of which Morgan suffered gross and crippling injuries. His right eye was destroyed, his left leg was caused to be amputated substantially above the knee, and he was otherwise most severely injured about the face, head and body.

Subsequently, on the 13th day of December, 1962, petitioner filed a common law action against M-G-M in the Superior Court of the State of Arizona, in and for the County of Maricopa, for permanent injuries and loss of earnings which to date, after eight and one-half years, total in excess of $225,000.00, predicated upon his proven earning capacity. Petitioner alleged that an inexperienced co-employee negligently caused Morgan to be knocked

under the wheels of the train on which he was performing, causing the wheels of three cars to run over him, thereby inflicting the injuries complained of with consequent pain, suffering, permanent injury and loss. Further, that M-G-M on the date of said injury had wholly failed to comply with the requirements of A.R.S. § 23-906, requiring that notices of Workmen's Compensation be conspicuously and continuously posted on the job site and rejection blanks be made available to all employees for their use in rejecting Workmen's Compensation benefits prior to injury, and that by reason of M-G-M's failure so to do, Morgan elected to sue his employer at common law for the injuries and loss sustained pursuant to said statute.

M-G-M answered, generally denying the allegation of negligence and pleading multiple defenses including the one pertinent hereto — lack of jurisdiction upon the grounds that petitioner had accepted benefits and thereby waived his right to sue his employer at common law, assumption of risk, and contributory negligence.

On April 30, 1964, M-G-M filed a motion to dismiss under Rule 12(b) and (d) Arizona Rules of Civil Procedure, 16 A.R.S.[1] upon the grounds stated in the answer that the court lacked jurisdiction by reason of Morgan's acceptance of workmen's compensation benefits thereby electing his remedy and waiving his right to sue; and sought a preliminary hearing to the court upon these issues. On May 19, 1964 defendant's motion for preliminary hearing was granted over plaintiff's objection[2] (including the objection that such a hearing would deny plaintiff of his right to jury trial under the Seventh Amendment of the United States Constitution). Pretrial order was entered, which, among other things adjudicated that the motion to dismiss on the jurisdictional

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[1] Arizona has adopted the Federal Rules of Civil Procedure and Rule 12(d) is identical with the Federal Rule.

[2] See *Magenau v. Aetna Freight Lines*, 79 S.Ct. 1184, 360 U.S. 273, 3 L.Ed.2d 1224, 1229 and See *Byrd v. Blue Ridge Rural Elec. Coop.* 78 S.Ct. 893 (1958), 356 U.S. 525, 2 L.Ed.2d 953, 962.

question would be heard without a jury but that the issues of negligence and damages would be submitted to a jury.

On June 4, 1964 petitioner sought certiorari upon said order in the Arizona Supreme Court cause No. 8407, on the grounds that his right to a jury trial had been denied. The Supreme Court refused to issue said writ on June 9, 1964.

Thus, the preliminary hearing on jurisdiction was conducted before a trial judge, sitting without a jury, commencing on June 10, 1964, and continuing on through the eleventh, twelfth and fifteenth days of June, 1964, at which time the court ordered a jury for the following day's trial. On June 16, 1964, at the conclusion of argument on the legal and factual issues, the court took defendant's motion to dismiss for lack of jurisdiction under advisement and declined to rule on the jurisdictional question in advance of a jury trial on the remaining issues of negligence and damages. M-G-M then petitioned the Arizona Supreme Court for a writ of mandamus (Cause No. 8421), demanding that the trial judge be ordered to rule on the jurisdictional question before proceeding further. The Arizona Supreme Court on that same day, without written opinion (contrary to Article 6 § 2 of the Constitution of Arizona) issued a preemptory writ directing the trial court to rule. On June 17, 1964 the trial court granted M-G-M's motion to dismiss for lack of jurisdiction. Findings of fact, conclusions of law and judgment thereon was entered on January 5, 1965. Among its findings and conclusions the court found that Morgan, on or about April 23, 1962, had either executed or caused to be executed and filed with the Industrial Commision of Arizona the "Workman's Report of Injury and Application for Benefits" (denominated throughout the record as Form C-407 App. A-39.) (patently referring to the forged document Jurgemeyer had obtained as hereinafter set forth); and that pursuant thereto he had received and accepted both medical and compensation benefits, thereby effectively making an irrevocable election of remedies and waived any right or option to sue his employer at common

law, even though the court also found that M-G-M had not fulfilled its statutory duty to post workmen's compensation notices on the job site (App. A-54).

At this point, Morgan again petitioned the Arizona Supreme Court (Cause No. 8653) for a writ of certiorari to review said judgment upon the grounds, among others, that he had been denied the right of trial by jury on the issues contrary to the provisions of Article 2 § 23 of the Arizona Constitution and the Seventh and Fourteenth Amendments to the Constitution of the United States. This writ was granted and on April 12, 1967 the Supreme Court of Arizona, in a split three-to-two decision affirmed, with Justice Fred C. Struckmeyer authoring a vigorous dissent, concurred in by Chief Justice Charles C. Bernstein. The decision is reported at 102 Ariz. 150, 426 P.2d 647 (App. A-3).

Within the time permitted by the rule, Morgan next filed in this Court a petition for certiorari to review the aforesaid judgment of the Supreme Court of Arizona upon the grounds that petitioner had been denied the right of jury trial guaranteed by the Seventh and Fourteenth Amendments and that he had further been denied due process of law (Cause No. 454, October Term, 1967) On October 9, 1967, the majority voted to deny the writ with Mr. Justice Black and Mr. Justice Douglas voting to grant (389 U.S. 859, 19 L.Ed.2d 125, 88 S.Ct. 105).

Charles M. Brewer, counsel for petitioner, on or about March 15, 1965 first discovered that the trial court had been ousted of jurisdiction by means of multiple acts of fraud (A.R. 168). This occurred at a luncheon meeting between Mr. Brewer and Richard J. Daniels, chief counsel of the Industrial Commission of Arizona and who was associated as co-counsel for M-G-M in the aforesaid preliminary hearing. Daniels revealed the fact that Glenn E. Jurgemeyer, claims investigator for the Industrial Commission of Arizona who purportedly obtained the "Workman's Report of Injury and Application for Benefits" (Form C-107), had been secreted or was told to absent himself from Maricopa

County to avoid testifying at the trial. Having been unable to serve Jurgemeyer with a subpoena requiring his attendance at the preliminary hearing, Brewer in concert with two other attorneys, interrogated Jurgemeyer in the presence of the chief investigator of the Industrial Commission of Arizona (Elmer Snow) with Jurgemeyer admitting in the recorded interview that he had never seen Morgan in the hospital and that he neither obtained nor filed the Form C-407 purportedly signed by Morgan and filed with the Commission (App. A-39). Concluding from this that Morgan's signature on the Form C-407 was a forgery, Brewer promptly secured the services of Dr. Paul Kirk, a qualified and nationally known criminologist, consultant on questioned documents and handwriting expert, who examined the document Form C-407 and executed an affidavit that Morgan's signature appearing on the said Form C-407 was either a forgery or placed thereon by the direct intervention of another person who guided the hand of Morgan in affixing his signature thereon (App. A-40). Jurgemeyer was next interrogated by the Maricopa County Attorney's Office at which time he admitted that he obtained the Form C-407 from Morgan and that he did not in any way assist Morgan in affixing his signature thereto. He further stated that he secured said signature between 10:30 and 11:00 a.m. on April 23, 1962.

This version of Jurgemeyer's complicity in the fraud is made wholly incredible by the affidavits of two of Morgan's physicians who were in attendance at his bedside removing wire sutures from his leg preparatory to surgery thereon scheduled later in the day. The physicians were assisted by a nurse who recorded on her patient's hospital chart (nurses notes) that the procedures carried out by the physicians were performed at the exact time Jurgemeyer claims to have obtained Morgan's signature. Both physicians and the nurse unequivocably state that neither Jurgemeyer nor any other claims investigator was in Morgan's room at the time or even on the day Jurgemeyer claims to have obtained the C-407.

Dr. Willard Hunter, Morgan's orthopedic surgeon, gave an

affidavit in which he verifies that he not only advised the nurse not to let anyone attempt to contact Morgan at said time but that Morgan at that time was neiher lucid nor rational and lacked comprehension, and was physically unable to even hold a fountain pen because of his position on the fracture bed in which he lay (App. A-43). Morgan's other physician, Dr. Paul B. Jarrett, confirms petitioner's complete incapacity on said date (A.R. 211). Morgan's special nurse (Krouse) not only corroborates the statements of the two physicians but further alleges that Industrial Commission employees attempted a bribe to secure her testimony at the preliminary hearing to the effect that Morgan was lucid or rational at or near the time he purportedly executed the C-407, for which said Commission would award her workmen's compensation upon a claim then pending with the Commission for injuries purportedly sustained while employed at another hospital (App. A-46). This attempted bribe is corroborated in full by a "Memorandum Confidential" from the chief special agent of the Industrial Commission to its chief counsel, the said Richard J. Daniels, explaining that workmen's compensation had been paid to nurse Krouse "in order to put her in a more cooperative frame of mind" (App. A-44). After a new chief counsel had been appointed for the Industrial Commission, Glenn E. Jurgemeyer gave his third version of his complicity in the "Morgan affair" admitting in writing that he had secreted himself in Pinal County, Arizona under an assumed name until after the preliminary hearing had been concluded at the express direction of Richard J. Daniels (App. A-51). The foregoing was corroborated by other responsible officials of said Industrial Commission, to wit: Elmer E. Snow, chief investigator (A.R. 194), C. E. Singer, Jr., chief referee (App. A-50), T. H. (Jack) Newman, Jr., legal investigator (A.R. 229), Archie R. Tufts, claims investigator (A.R. 244).

Based on this newly discovered evidence of fraud contaminating the judgment, petitioner filed a motion for a new trial in the

Superior Court of Maricopa County, under Rule 60(c) A.R.C.P. showing the following:

1. That the "Workman's Report of Injury and Application for Benefits" purportedly filed by Robert D. Morgan was a forgery. On April 23, 1962, Morgan was physically incapable and mentally incompetent by reason of his injuries to execute such an instrument or to comprehend the nature or consequences of any act according to his doctors and nurse who emphatically deny the presence of any state claims agent.

2. That Richard J. Daniels, chief counsel for the Industrial Commission of Arizona (also employed as associate counsel and as a witness for M-G-M at the preliminary hearing) had directed and caused Glenn E. Jurgemeyer, the Industrial Commission claims investigator who purportedly procured the "Workman's Report of Injury and Application for Benefits" (Form C-407) to avoid a subpoena issued out of the court requiring his attendance at the trial and to absent himself from Maricopa County under an assumed name until the cause had been concluded, thereby preventing petitioner from fully exhibiting his case.

The 60(c) motion and relevant portions of the supporting documents furnished to the trial court are contained in the Appendix E 1-9 (App. A-34-51). Said motion was continued by stipulation of the parties pending determination of the prerogative writ to the Arizona Supreme Court (No. 8653) above and was ultimately denied after oral argument by formal written order on July 25, 1967. An appeal from said order was taken by Morgan to the Court of Appeals of the State of Arizona, Division One, Department B, which court rendered its decision on January 6, 1970 affirming the denial of petitioner's motion for new trial. Rehearing was denied by said court February 19, 1970 and petition for review to the Supreme Court of the State of Arizona was denied on March 17, 1970. On June 16, 1970 Mr. Justice Potter Stewart, upon Morgan's petition, ordered that the time for filing

a petition for Writ of Certiorari herein be extended to and including August 13, 1970.

ARGUMENT AND REASONS FOR GRANTING WRIT

Petitioner urges the following reasons why the petition for Writ of Certiorari should be granted in this case:

The petitioner has been denied the fundamental right to trial by jury deemed essential to a fair trial upon the issues of fraud, waiver, and election of remedies, resulting in the refusal of the state court to assume jurisdiction. The contest from its inception was unequal, and remained so throughout the proceeding because the fraud was practiced upon petitioner by representatives of the Industrial Commission of Arizona and his employer M-G-M at a time when Morgan was rendered physically helpless and mentally insensible from the near fatal injuries sustained in performance of his work. On April 23, 1962 while Morgan was virtually moribund, Glenn E. Jurgemeyer, the Industrial Commission claims investigator, procured a forged or otherwise fraudulent "Workman's Report of Injury and Application for Benefits" (Form C-407) bearing petitioner's purported signature thereon and which was received in the Commission's office on April 24, 1962. The claim was thereupon approved for payment and the Commission issued checks in partial payment of petitioner's medical expenses for hospital, doctors and nursing care and treatment and further issued a number of compensation checks payable to petitioner commencing with the date of April 27, 1962 and concluding on November 21, 1962. These checks were deposited to Morgan's acciunt although there is not a scintilla of evidence in the record that Morgan was advised, knew or understood that by accepting the same he was electing his remedy under the Workmen's Compensation Act and was waiving his right to sue his employer.

The filing of the "Form C-407" together with the payment of benefits as aforesaid, constituted the elements of M-G-M's defense asserted at the preliminary hearing in the state court between dates

of June 10th and 15th, 1962. The federal question as to whether petitioner was entitled to a jury trial of the issues under the Seventh Amendment was promptly raised at the trial level in Morgan's objections to M-G-M's request for a hearing under Rule 12(d); and petitioner's right to a jury trial under the Seventh and Fourteenth Amendments was again raised in Morgan's petition for certiorari to the Arizona Supreme Court (No. 8653) which was granted to review the findings, conclusions and judgment entered on January 5, 1965, by the trial court at the conclusion of the preliminary hearing. The Arizona Supreme Court in its decision on an extended certiorari filed April 12, 1967 in *Morgan v. Hays*, supra, affirmed the trial court's denial of the right to a jury trial without mention of the federal constitutional guarantees, and in ruling on the merits held the findings, conclusions and judgment to be sustained by the evidence.

While this petition for certiorari is taken from the judgment of the Court of Appeals of the State of Arizona, sustaining the superior court's denial of petitioner's motion for new trial under Rule 60(c) A.R.C.P., it is submitted that petitioner is not thus foreclosed from reliance on the basic and fundamental right to a trial by jury preserved by Article 2 § 23 of the Arizona Constitution and the guarantees of the Seventh and Fourteenth Amendments of the United States Constitution in that the federal question, having been considered in the Supreme Court of Arizona on the certiorari (No. 8653) is properly before this Court. *Gant v. Oklahoma City*, 289 U.S. 98, 53 S.Ct. 530, 77 L.Ed. 1058; *Washington ex rel. Grays H. L. Co. v. Superior Court*, 243 U.S. 251, 37 Sup.Ct.Rep. 295, 61 L.Ed. 702; *Erie R. Co. v. Purdy*, 185 U.S. 148, 154, 46 L.Ed. 847, 850, 22 Sup.Ct.Rep. 605; *Southern R. Co. v. Kentucky*, 274 U.S. 76, 90, 91, 47 Sup.Ct.Rep. 542, 71 L.Ed. 934, 941; *Reece v. Georgia*, 350 U.S. 85, 100 L.Ed. 77, 76 S.Ct. 167.

As stated, the Arizona Supreme Court sustained the superior court judgment for lack of jurisdiction upon the assumption that Morgan had knowingly applied for and accepted the benefits pro-

vided under the Workmen's Compensation Act, and that by reason thereof was conclusively deemed to have waived his right to sue at common law under state statutes and case law. On the motion for new trial, it was conclusively shown:

1. That Morgan did not execute the "Workman's Report of Injury and Application for Benefits," but that his signature on said form C-407 was the product of a forgery (App. A-40, 42);

2. That Morgan was physically incapable of signing and mentally incompetent to understand or comprehend the significance of the election of remedies accomplished thereby (App. A-43, 46);

3. That the judgment was tainted by fraud conceived and directed by Richard J. Daniels — chief counsel for the Industrial Commission of Arizona and co-counsel for M-G-M in the conduct of the preliminary hearing, intentionally causing Glenn E. Jurgemeyer to avoid the service of a subpoena issued at the request of petitioner's counsel requiring said witness's testimony to be given at said hearing, and further causing said witness to be secreted outside the county where the hearing was conducted under an assumed name until the case had been concluded, thereby effectively preventing Morgan from fully exhibiting his case and demonstrating the fraud which was ultimately unfolded (App. A-51).

Where, as in this case, a litigant has been prevented from fully exhibiting his case by fraud, either in the presentation of forged instruments, perjured testimony, or in secreting witnesses, thereby influencing the judgment entered, a new trial must be granted. *U.S. v. Throckmorton*, 98 U.S. 61, 25 L.Ed. 93 (1878); and see *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246, 64 S.Ct. 997, 88 L.Ed. 1250 (1944); and *Pickford v. Talbott*, 225 U.S. 651, 56 L.Ed. 1246, 32 S.Ct. 687, holding that when a judgment is procured by a fraud on the court, the insult to public institutions is so great that it cannot be tolerated in an ordered society and requires a new trial. Where either perjured testimony or forged documents influence the rendition of a judgment it

becomes the duty of a court to grant a new trial; *Peacock Records, Inc. v. Checker Records, Inc.*, (7th Cir. 1966) 365 F.2d 145, 147; and see *Brady v. Beams* (10th Cir. 1942) 132 F.2d 985-987, wherein it is, among other things, held that wrongfully preventing a material witness from attending the trial constitutes extrinsic fraud upon the court justifying relief. Accord: *Clavey v. Loney*, 80 Cal.App. 20, 251 Pac. 232; *Godfrey v. Godfrey*, 80 Cal. App.2d 370, 86 P.2d 357; *Jeffords v. Young*, 277 P.2d 163 (Cal.).

Having prevailed in the hearing conducted under Rule 12(b)(d) A.R.C.P. because of the fraud practiced upon the court by one of its attorneys, M-G-M is estopped to dispute or refute the effectiveness of the contrivances bringing about the judgment and appellate court decisions based thereon which followed. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, supra; nor will it be permitted to escape the consequences of the deception practiced upon all the courts which have heretofore undertaken to review this cause on a record then seemingly devoid of fraud. See also, *Peacock Records, Inc. v. Checker Records, Inc.*, supra.

Except for Morgan's forged signature upon the Form C-407 and the wholly unauthorized filing of the same, the Industrial Commission of Arizona would have been entirely without jurisdiction and could not have made an award of benefits of any kind. The Arizona Supreme Court in its recent decision of *Collins v. The Industrial Commission*, 102 Ariz. 509, 433 P.2d 801, acknowledges that no jurisdiction is granted the Industrial Commission of Arizona until a formal application is filed pursuant to A.R.S. § 23-1061 (App. A-55).

At this point we deem it imperative to point out that the Arizona legislature intended a built-in safeguard to prevent overzealous claims investigators or other industrial commission personnel from defrauding injured workmen or subverting the purposes of the Act, in that § 23-1061 in part states:

"* * * The physician *shall inform* the injured employee of

his rights under this chapter and *shall give all necessary assistance in making the application for compensation* and such proof as required by the rules of the Commission without charge." (Emphasis supplied)

There is not one scintilla of evidence that anyone informed Morgan as to his rights on April 23, 1962, when the C-407 purportedly was obtained. The evidence is exactly to the contrary, for Dr. Willard S. Hunter had in effect placed a "no visitors" sign on Morgan's door, barring all claims men and other investigators interested in the case, because Morgan was in such poor mental and physical condition he simply wasn't competent to deal with them (App. A-43).

If Glenn E. Jurgemeyer, Industrial Commission claims investigator who procured and filed the C-107 with the Commission, had not been secreted from the trial at the direction of the Commission's chief counsel, Richard J. Daniels, the shabby fraud perpetrated upon petitioner could have been detected by the court and the hypocrisy of M-G-M's procedural strategy and substantive defense on the jurisdictional aspect laid bare.

As the matter stands here it is plain that notwithstanding state law seemingly giving petitioner the right to his day in court, state judges have either been unequal to the task or insensitive to the commands of not only the State Constitution but also the Due Process Clause of the Fourteenth Amendment protecting the Seventh Amendment to the United States Constitution. The view that in case brought under the provisions of the Workmen's Compensation Act the trial court's jurisdiction was a question of law to be determined by the court without a jury was first given voice in the United States Court of Appeals in *Taylor v. Hubbell*, (9th Cir. 1951) 188 F.2d 106, which was followed by the Arizona Supreme Court a short time later in its decision in *State v. Pressley*, 74 Ariz. 412, 250 P.2d 992 (1952). Arizona has ever since adhered to the rule thus laid down although it seems to have countenanced a jury trial upon the same jurisdictional

question here at issue in *Juvne v. Del E. Webb Constr. Co.*, 76 Ariz. 418, 265 P.2d 1076 (1954) wherein it is said:

> "The important issue to determine in this appeal is whether appellant submitted any competent evidence that entitled *him to go to the jury upon the ground that defendant-appellee failed to post a notice as required by the statute.*" (Emphasis supplied)

Moreover, the 9th Circuit decision in *Taylor v. Hubbell*, supra, is not consistant with its prior decision in *Miles v. Lavender*, (9th Cir. 1926) 10 F.2d 450, which recognized the necessity of a jury trial when expressly dealing with the question of election of remedies under the Arizona Workmen's Compensation Act. In that case an injured workman was allowed to prevail even though he had applied for and accepted benefits for a substantial period before commencing his action in the District Court of Arizona. The view that a written election may be considered voidable by a claimant under the Arizona Workmen's Compensation Act if there has not been an intentional abandonment of a known right or privilege is again expressed in *United States v. Miller*, (9th Cir. 1964) 331 F.2d 414, 416 which held that a claimant was not foreclosed by having had accepted compensation payments in Arizona for a period of twenty-three months where it did not appear that the claimant had knowledge of her rights. The 9th Circuit seems to have come full circle since in 1959 that court in *Marks Food Corporation v. Barbara Ann Baking Co.*, 274 F.2d 934, sustained the right to a jury trial and quoted extensively from *Beacon Theatres v. Westover*, 359 U.S. 500, 3 L.Ed.2d 988, 79 S.Ct. 948, and in a footnote qualified its holdings in *Taylor v. Hubbell*, supra.

The foregoing makes it clear that petitioner here is the victim of a construction of state law which was originated in the federal courts although such courts have now abandoned their prior views. Albeit, Arizona courts, in this type of action, deny petitioner a jury trial upon issues which are questions of fact.

The issues of waiver, release, election of remedies, in common

law civil actions have always been triable to a jury in both the state and federal courts: *Smith v. Price Bros. Co.*, (6th Cir. 1942), 131 F.2d 750, *cert. denied*, 318 U.S. 762, 87 L.Ed. 1134, 63 S.Ct. 560; *Dice v. Akron C. & Y. R. Co.*, 342 U.S. 359, 96 L.Ed. 398, 72 S.Ct. 312; *Johnson v. American-Hawaiian S. S. Co.* (9th Cir. 1938), 98 F.2d 847; *Miles v. Lavender*, supra; *Byrd v. Blue Ridge Rural Elec. Coop.*, supra.

See also *Ross-Engineering Co. v. Pace* (4th Cir. 1946), 153 F.2d 35, 50 (waiver); *Cannon v. Travelers Indemnity Company* (8th Cir. 1963) 314 F.2d 657 (waiver); *Coules v. Ohio Farmers Insurance Group* (4th Cir. 1957), 242 F.2d 73; *Buffum v. Chase Nat. Bank of City of New York* (7th Cir. 1951) 192 F.2d 58, *cert. denied*, 342 U.S. 944, 96 L.Ed. 702, 72 S.Ct. 558.

State courts also grant jury trials on issues of waiver and release. See *Arizona Title Guarantee & Trust Co. v. Modern Homes*, 84 Ariz. 399, 330 P.2d 113 (1958); *Murphey v. Valenzuela*, 95 Ariz. 30, 386 P.2d 78 (1963); *City of Tucson v. Koerber*, 82 Ariz. 347, 313 P.2d 411 (1957); *In re Brandt's Estate*, 67 Ariz. 42, 190 P.2d 497 (1948); *Meason v. Ralston Purina Co.*, 56 Ariz. 291, 107 P.2d 224; *Southwest Cotton Co. v. Valley* Bank, 26 Ariz. 559, 227 Pac. 986 (1924); and also grant jury trials on issues of fraud:

Lumbermen's Reciprocal Ass'n v. Day (Tex.) 17 S.W.2d 1043; 270; *Duncan v. Texas Employers' Ins. Ass'n* 105 S.W.2d 403, 405; *Bullocks v. Texas Employers' Ins. Ass'n* 254 S.W.2d 554; Mich.) *Southern Pacific Co. v. Gastelum*, 36 Ariz. 106, 123, 283 Pac. 719; *Brown v. Ann Arbor R. Co.*, 183 Mich. 574 149 N.W. 1030.

Though adjuring for decades that the first ten Amendments are not concerned with state action, and a corollary that the Seventh Amendment applies only to proceedings in the courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts as the standards which must be applied concerning same, *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211, 60 L.Ed. 961, 36 Sup. Ct. 595;

this Court has not remained insensitive to the necessities for changes in the construction of these Amendments.

Fact questions on the issue of fraud, waiver, and release have uniformly been considered issues which must be submitted to a jury under both state and federal law. We should be immodest, did we not urge Justice Struckmeyer's dissent (concurred in by Chief Justice Bernstein) in *Morgan v. Hays,* supra, (App. A-14), as our best reasons why Morgan is entitled to a jury trial under state law. Where fraud has tainted the judgment at issue, the reasoning of that dissent becomes much more persuasive, even though the facts disclosed in petitioner's 60(c) motion were unknown, and were not considered at the time the case was reviewed by the Arizona Supreme Court.

Although petitioner clearly, convincingly, and indeed conclusively, demonstrated that the judgment dismissing plaintiff's complaint was the result of fraud which was not known at the time of the hearing or shown to the Arizona Supreme Court on the certiorari, (and patently was not considered there) the trial court, remaining obdurate on the jurisdictional question, denied relief, and the Court of Appeals affirmed, *Morgan v. Hays,* supra, on the grounds or res judicata, citing the very findings and conclusions entered by the trial court relied upon in the Arizona Supreme Court's decision on the certiorari, which were and are irredeemably tainted by the fraud practiced on the court in secreting a material witness and forging documents prerequisite and indeed indispensible to any attempt to oust the court of jurisdiction. Moreover, it is uniformly held that the doctrine of res judicata may not be invoked to sustain a judgment obtained by means of fraud. The reason is well stated in 30A Am.Jur., *Judgments,* §358, pp. 399-400. Arizona is committed to the principle that a final judgment may always be impeached for fraud, *Tube City Min. etc. Co. v. Otterson,* 16 Ariz. 305, 146 Pac. 203; *City of Phoenix v. Greer,* 43 Ariz. 214, 29 P.2d 1062. The rule is particularly applicable where, as here, the fraud goes

to the jurisdiction of the court; *Grand I. B. of Locomotive Engrs. v. Mills*, 43 Ariz. 379, 31 P.2d 971.

Lastly, there was no impediment to the filing of the 60(c) motion after the Supreme Court's ruling on the certiorari, since petitioner first returned to that court and was there granted leave to seek relief if any was to be granted at the trial level.

Lying at the very threshold of our contention that this Court should issue the writ under the Due Process Clause of the Fourteenth Amendment is the illuminating language of the majority opinion in *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444, wherein the majority recounts that no less than five of the first ten Amendments to the Constitution are now made applicable to the states.

While Mr. Justice White did not in that decision include the Eighth Amendment among those protected against state action by the Due Process Clause, it must certainly be included under *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed.2d 799, 8 S.Ct. 7921, 93 A.L.R.2d 733. From this we observe that the necessities of the people have changed this Court's construction of the Bill of Rights from its early position that none of the first ten Amendments were applicable to the states, *Minn. & S. L. R. Co. v. Bombolis*, supra, to the current status where fifty per cent of said first ten Amendments have been held by this Court to be applicable to the states. We are not aware that this Court has directly held that the Seventh Amendment guarantees a jury trial under state law, and yet there is no reason why this should not be so in this unique and selective case. Here the record shows that an agency of the State of Arizona, through its responsible officials and employees, have defrauded a crippled workman out of his day in court. Despite strenuous efforts to correct the wrong, Morgan is still without a remedy, although undeniably he has the right to sue his employer under the Constitution of the State of Arizona, Article 18 §8, (App. A-53) and the statutes enacted by the legislature pertinent thereto, A.R.S. §23-906. These circumstances

patently show that Morgan's right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"; it is a right "basic in our system of jurisprudence" and it is "a fundamental right essential to a fair trial". These paraphrases from *Duncan v. Louisiana,* supra, are the heart of the quest here.

If the potential of a jail sentence of two years on a conviction for an offense triable without a jury was sufficient to invoke the Fourteenth Amendment to protect rights guaranteed under the Sixth Amendment (*Duncan v. Louisiana,* supra), then surely the same reasoning requires that the Seventh Amendment protect a jury trial in this civil action for damages which have stripped Morgan of his manhood as well as his livelihood.

No tribunal has been more sensitive than this Court to the necessity for updating and even upgrading the quality of the law throughout the nation, especially as it relates to due process in all of its applications.

Parker v. Gladden, 385 U.S. 363, 17 L.Ed.2d 420, 87 S.Ct. 468, while dealing with a criminal case, is a clear indication that when state officers (there a court bailiff) prejudice the rights of a defendant in the eyes of a jury it is sufficient to be controlled by the command of the Sixth Amendment made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Here petitioner was prejudiced in an even more serious manner since his entire life is affected by his loss of sight and limb.

Either it should be held that the Seventh Amendment is applicable to the states or that the fraud perpetrated by the chief counsel and subordinate employees of the Arizona Industrial Commission violated the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth. See Mr. Justice Harlan's concurring opinion in *Klopfer v. North Carolina,* 386 U.S. 213, 18 L.Ed.2d 1, 87 S.Ct. 988.

CONCLUSION

The Writ of Certiorari should issue in this case for the reasons stated.

Respectfully submitted,

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Attorney for Petitioner

Certificate of Service

I Hereby Certify that three true copies of the foregoing Petition for a Writ of Certiorari and Appendix thereto were delivered to Robert Park, Chief Counsel, Arizona State Compensation Fund, 1616 West Adams Street, Phoenix, Arizona, 85007, and to Jennings, Strouss & Salmon, 111 West Monroe Street, Phoenix, Arizona, 85003, this 12th day of August, 1970.

Stewart L. Udall

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SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 532

ROBERT D. MORGAN,

Petitioner,

vs.

METRO-GOLDWYN-MAYER, INC.
a Delaware corporation,

Respondent,

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF
THE STATE OF ARIZONA

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SUPREME COURT OF THE UNITED STATES

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BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF
THE STATE OF ARIZONA

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether this Court should review a denial of a motion to set aside a judgment under Rule 60(c) of the Arizona Rules of Civil Procedure, where the reasons for the denial of that motion are (a) under Arizona law, a ruling of the Arizona Supreme Court on a prior appeal of the same case is now res judicata and dispositive of the rights of the parties and (b) even if the alleged acts of fraud and other misconduct were proven, under applicable Arizona law, there would have been no change in the result.

2. Whether this Court should consider an alleged federal jury trial issue which was neither raised before, nor considered by, the Arizona courts from which this Petition is taken, but which was properly presented to this Court three years ago in a Petition for Certiorari involving these same parties, seeking review of a final judgment of the Arizona courts squarely ruling upon the alleged federal issue.

ARIZONA RULE OF CIVIL PROCEDURE INVOLVED

Notwithstanding the Petitioner's assertions, this case does not involve any constitutional or statutory provisions. Rule 60(c) of the Arizona Rules of Civil Procedure provides as follows:

> "60(c) *Mistake; inadvertence; surprise; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons

(1), (2) and (3) not more than six months after the judgment, order or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant served by publication as provided by Rule 59(j) or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. Amended July 14, 1961. Effective on and after midnight Oct. 31, 1961."

STATEMENT OF THE CASE

This is the second time that this case, involving these same parties, has been before this Court. The first time, in *Morgan v. Hays,* 389 U.S. 859, No. 454, O.T. 1967, an alleged federal issue was involved, the jury trial issue which the Petitioner attempts to inject into the instant proceeding. This Court denied the Petition for Certiorari in that case, Mr. Justice Black and Mr. Justice Douglas noting their opinion that certiorari should be granted.

The issues in the instant case are far more limited than the first time the case was before this Court. The issues presented by this Petition arise in the context of a denial by the trial court of a motion which the Petitioner entitled "motion for new trial on grounds of newly discovered evidence, fraud, other substantial reasons justifying relief" under Rule 60(c) of the Arizona Rules of Civil Procedure.[1] The judgment which this Petition seeks to review is not the 1967 judgment of the Arizona Supreme Court dealing with jury trial, but rather the 1970 judgment of the Arizona Court of Appeals dealing with a motion under Rule 60(c) of the Arizona Rules of Civil Procedure.

On this go-round of the case, there is no jury trial issue nor

[1] As the Arizona Court of Appeals pointed out, the motion was actually one to set aside the judgment.

any other federal issue. Indeed, no federal issue was even urged at any stage before the Arizona courts. Jury trial as an issue in this second phase of the *Morgan v. MGM* litigation is now raised for the first time before this Court. The sole issues in the case at this time are issues of Arizona state law.

A brief chronology of the facts of the case will highlight both the lack of any federal issue in the present Petition, and also the correctness of the Arizona courts' holdings.

The Petitioner was injured near Superior, Arizona on April 9, 1962 while working for the Respondent as a stuntman in the filming of the movie, "How The West Was Won." MGM had obtained Workmen's Compensation insurance for its employees, both in the State of Arizona and also in the State of California, during the entire time that Petitioner was employed by MGM. Under governing Arizona law, Workmen's Compensation coverage by the employer precludes suit against the employer by an injured employee if either (1) the employer has complied with legal requirements concerning the imparting of notice to the employee and keeping available rejection slips (by means of which the employee can reject Workmen's Compensation coverage, if he so elects) A.R.S. § 23-906, or (2) the employee has actually applied for *or* accepted Workmen's Compensation benefits. A.R.S. § 23-1024.

Following his admission to the hospital, on two separate occasions, April 16, 1962, and April 19, 1962, Petitioner sought and obtained the advice of two attorneys from a prominent Phoenix law firm, Snell & Wilmer. The trial judge found that on the occasions of those interviews with his attorneys, he was "lucid and responsive."[2] These attorneys advised him that he should apply for and accept Workmen's Compensation.

Because the Petitioner bases his entire case upon the circum-

[2]Finding of fact No. 30. (Appendix pp. 27-28). For the Court's convenience the original findings of fact and conclusions of law made by the trial judge in 1965 are set forth in full as Appendix A to this Brief.

stances surrounding the execution of the form C-407— executed on April 23, 1962—a brief comment concerning that document is in order. We strenuously deny all implications of fraud and other misconduct imputed to Mr. Richard J. Daniels, then Chief Counsel for the Industrial Commission, in connection with the obtaining of form C-407. Mr. Daniels himself, and also Mr. Aaron Nelson, then head of the Industrial Commission's Private Carrier Department, have unequivocally denied any such misconduct.[3]

Upon analysis, it does not matter whether Petitioner signed the form C-407 or not. The really significant fact surrounding the form C-407, is that the Arizona courts have ruled that it can be completely disregarded without making any difference to the outcome of the case. Under applicable Arizona law, therefore, the circumstances surrounding its execution are irrelevant. Indeed, the form C-407 was not even offered in evidence by the defendant, but rather by the plaintiff, as plaintiff's Exhibit 41. The execution of the C-407 was only one in a long series of applications for and acceptances of Workmen's Compensation benefits by the Petitioner. The trial judge made the following findings dealing with the waiver issue:

> 33. Thereafter [following execution of the C-407] and on May 23, 1962; June 27, 1962; July 13, 1962; July 20, 1962; July 28, 1962; August 2, 1962; August 16, 1962; September

[3]Included in the record in this case are sworn statements by Mr. Daniels and Mr. Nelson. Both of these affidavits deny that the assignment of Mr. Jurgemeyer to make the trip to Casa Grande was for the purpose of making himself unavailable as a witness.

Concerning the obvious conflict between these statements of Messrs. Daniels and Nelson on the one hand, and Mr. Jurgemeyer on the other, we can only point out that as the Petitioner himself recognizes, Mr. Jurgemeyer has told three different stories concerning the obtaining of plaintiff's exhibit 41.

For reasons set forth in the body of the brief, the imputations of improper conduct in connection with the obtaining of the form C-407, plaintiff's Exhibit 41, are irrelevant in any event. For whatever interest the Court may have in this matter, however, we have attached the affidavits of Mr. Daniels and Mr. Nelson as Appendices B and C, respectively, to this brief.

1, 1962; September 16, 1962; October 1, 1962; October 17, 1962; November 2, 1962; November 16, 1962; and December 2, 1962, plaintiff executed or caused to be executed documents entitled "Workman's Supplemental Claim for Compensation" and filed or caused the filing of said documents with the Industrial Commission of Arizona, knowing and understanding that these were claims for Workmen's Compensation.

34. The Industrial Commission of Arizona caused to be paid and plaintiff accepted Workmen's Compensation Benefits pursuant to each of the aforesaid "Workman's Report of Injury and Application for Benefits" and "Workman's Supplemental Claim for Compensation" under and pursuant to the provisions of the laws of the State of Arizona for the period from April 10, 1962, through November 16, 1962, in the total sum of $4,795.41.

35. In addition to the aforesaid Workmen's Compensation Benefits, the Industrial Commission of Arizona paid or caused to be paid medical and hospital expenses of plaintiff in the sum of $15,246.70. (Findings of Fact Nos. 33-35, Appendix pp. 28-29.)

Based upon these findings the trial court held that:

6. The plaintiff, by making a claim for Workmen's Compensation Benefits and continuing to accept the same with full knowledge of his legal rights and with full knowledge of the legal conditions precedent to a suit against his employer, waived any right or option, if any, which he ever had to file any claim in this Court against his employer. (Conclusion of Law No. 6, Appendix p. 30.)

Thus, on fourteen different occasions, extending over a period of more than six months, the Petitioner applied for and received Workmen's Compensation benefits and medical and hospital expenses totalling some $20,000.00.[4] It has never been contended at any stage of these protracted proceedings, that these applications for and acceptance of Workmen's Compensation and medical and hospital benefits were in any way tainted. The dispositive

[4]The Petitioner is, of course, still entitled to Arizona's Workmen's Compensation benefits, which are among the most liberal in the nation. His entitlement extends to benefits which have accrued since the time he stopped accepting such benefits in December of 1962.

point is that under Arizona law, either application for *or* acceptance of Workmen's Compensation constitutes a waiver of the right of the employee to sue his employer.[5] Indeed, the Arizona Supreme Court, in its 1967 opinion in this case, held that the acceptance of these benefits by Mr. Morgan constituted a waiver under controlling Arizona law. That Court's holding was as follows:

> The [trial] court went on to find that claims had been presented, and petitioner was paid compensation in a total sum of $4,795.41, and medical and hospital expense in the sum of $15,246.70. These findings of the court were substantially supported by the evidence. Under these circumstances we do not feel that the court erred in its conclusion that there had been a waiver. *Since the waiver alone is sufficient, it is not necessary for us to pass upon the other matters raised by the petitioner* in regard to the jurisdiction of the court, and having decided this case upon its merits it is not necessary for us to pass upon

---

[5] A.R.S. § 23 1024 A provided at times material to this litigation as follows: § 23-1024. Choice of remedy as waiver of alternate remedy

A. An employee, or his legal representative in event death results, who makes application for an award, or with the consent of the commission accepts compensation from an employer, waives the right to exercise any option to institute proceedings in court.

The Petitioner contends that there is no evidence in the record that he knew that by applying for and accepting these payments he was waiving his right to sue. In the first place, the trial court found that he received legal advice from two attorneys, and that they advised him both orally and in writing that he should accept Workmen's Compensation benefits. (Finding of Fact Nos. 29-31, Appendix pp. 27-28.) The trial court also found that Petitioner "filed or caused the filing of said documents knowing and understanding that these were claims for Workmen's Compensation" (Finding of Fact No. 33, Appendix *Id.* at 28) and held that "the plaintiff, by making a claim for Workmen's Compensation Benefits and continuing to accept the same with full knowledge of his legal rights and with full knowledge of the legal conditions precedent to a suit against his employer, waived any right or option, if any, which he ever had to file any claim in this Court against his employer." (Conclusion of Law No. 6, Appendix *Id.* at 30.) Therefore in contending that there is no evidence Morgan knew what he was doing, Petitioner ignores the trial court's findings and conclusions. Moreover, the extent of any knowledge required to effect a waiver under the statute is solely a matter of Arizona law.

the propriety or the timeliness of the filing of the writ of certiorari after the time for appeal has expired. *Morgan v. Hays,* 102 Ariz. 150, 156, 426 P.2d 647 (1967). Appendix to Petition for Certiorari, page A-13. (Emphasis added.)

Therefore, the Arizona Supreme Court has expressly held that under Arizona law the presentation of claims and the acceptance of $4,795.41 in Workmen's Compensation and $15,246.70 in medical and hospital expenses by Mr. Morgan constituted a waiver of his right to sue his employer.

Against this background, the correctness of the ruling of the Arizona Court of Appeals from which this Petition for Certiorari is taken, becomes apparent. All of the Petitioner's allegations of misconduct pertain solely to plaintiff's Exhibit 41, the form C-407.[6] But the Arizona Supreme Court has held in a prior decision in 1967 — and this holding is res judicata under Arizona law — that the acceptance of benefits, wholly aside from the C-407, is sufficient standing alone to constitute a waiver of the common law right to sue. As the Court of Appeals observed in the opinion which the Petitioner asking this Court to review;

"However, assuming actual fraud in the procurement of Form C-407, the initial application in 'making a claim' — would this fact alone raise matters which would place appellant's motion outside of the compass of the mandate [of the Supreme Court in *Morgan v. Hays*]? We believe that it would not. The decision upon which the mandate is based goes far beyond 'making' the initial form C-407 claim, and is based primarily upon appellant's personal knowledge, the legal advice he received, and his continued application for and acceptance of Workmen's Compensation benefits over an extended period of time and therefore if fraud existed initially, it is immaterial. The findings of fact set out herein sufficiently illustrate this point

[6]The only conceivable purpose for which the Petitioner might have used Mr. Jurgemeyer as a witness was for the purpose of establishing facts relevant to plaintiff's Exhibit 41, form C-407. Indeed the Petitioner clarified in his reply brief before the lower court that this was the sole purpose for which he would have used Mr. Jurgermeyer as a witness (Appellant's Reply Brief, Morgan v. MGM, Arizona Court of Appeals, No. 1 CA-CIV 746, p. 20.)

without further elaboration." *Morgan v. MGM*, 11 Ariz. App. 223, 227, 463 P.2d 118 (1970). Appendix to Petition for Certiorari, p. A-30.

The findings of fact referred to by the Court of Appeals are those which are numbered 33, 34 and 35, set forth above.

Accepting fully, therefore, the Petitioner's proposition that a judgment obtained by fraud may not have res judicata effect, that proposition is immaterial where, as here, the alleged fraud pertains to matters outside the scope of the original holding. Every single allegation of improper conduct — fraud in secreting a witness, forgery, bribery — relates solely to plaintiff's exhibit 41; the Arizona courts have ruled that under Arizona law (1) plaintiff's exhibit 41 can be disregarded without changing the judgment, and (2) the Petitioner is foreclosed from raising the issue because of a prior judgment involving these same parties.

In any event, these rulings involve solely matters of Arizona law, on which the Arizona courts have spoken. Significantly, the Arizona Supreme Court denied the petition for review of the Court of Appeals decision.

REASONS FOR DENYING THE WRIT

I.

There Is No Federal Issue In This Case

At the time that this case was before this Court three years ago, there was an arguable federal issue — whether Petitioner had a federal right to a jury trial on the question of whether, under the Arizona Workmen's Compensation law, he was precluded from bringing a common law action against his employer. That issue was squarely presented and briefed by both Petitioner and Respondent at that time, and this Court denied the Petition. *Morgan v. Hays*, O.T. 1967, No. 454, cert. den. 389 U.S. 859.

The present case does not involve a jury trial issue or any other federal issue. The decision of the Arizona Court of Appeals from which this Petition is taken is an affirmance of the trial court's

denial of a motion to set aside a judgment under rule 60(c) of the Arizona Rules of Civil Procedure. The sole issues which are presented by this case are issues pertaining to the propriety of the trial judge's denial of that motion. Neither under Rule 60(c) of the Arizona Rules of Civil Procedure nor under its federal counterpart, Rule 60(b) of the Federal Rules of Civil Procedure, is there any provision for jury trial on motions to set aside a judgment. Under both the federal and the state rules, such motions are addressed to the discretion of the trial judge. *Provident Sec. Life Ins. Co. v. Gorsuch*, 323 F.2d 839 (9th Cir. 1963), cert. den. 376 U.S. 950; *Laguna Royalty Co. v. Marsh*, 350 F.2d 817 (5th Cir. 1965); *Parker v. Broadcast Music, Inc.*, 289 F.2d 313 (2d Cir. 1961); *Thomas v. Goettl Bros. Metal Products, Inc.* 76 Ariz. 54, 258 P.2d 816 (1953); *Marsh v. Riskas*, 73 Ariz. 7, 236 P.2d 746 (1951).

The Petitioner himself concedes that his 1967 Petition for Certiorari filed in this Court was based "upon the grounds that Petitioner had been denied the right of jury trial guaranteed by the Seventh and Fourteenth Amendments and that he had further been denied due process of law." Petition, p. 6. That Petition was denied. Upon the denial of that Petition, the judgment that Petitioner was not constitutionally entitled to a jury trial on the waiver issue became res judicata as between these parties. *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939); *Heiser v. Woodruff*, 327 U.S. 726 (1946); *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

Three years ago this Court considered and denied a Petition seeking review of decisions of the Arizona courts holding that the queston of waiver is a question for the court rather than the jury. The case as it comes before the Court at this time does not involve that issue. It involves only the denial of a motion under Rule 60(c) of the Arizona Rules of Civil Procedure.

II.

The Petitioner Did Not Raise the Purported Federal Issue Before the Lower Courts

Even if the purported jury trial issue were present in the instant case, and even if the issue had not been ruled upon by this Court on a prior Petition for Certiorari involving these same parties, the Petitioner would nevertheless be foreclosed from raising the issue at this stage because of his failure to raise it before the Arizona courts. *Beck v. Washington*, 369 U.S. 541, 550-554 (1962); *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-463 (1936); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919).

The purported jury trial issue was not presented at any stage before the Arizona courts. The Arizona Court of Appeals correctly summarized the issues raised by the Petitioner before that Court as follows:

> "Appellant raises three questions on appeal: First, did the trial court abuse its discretion in denying plaintiff's motion for a new trial pursuant to Rule 60(c), Rules of Civil Procedure; Second, were the facts shown upon plaintiff's motion for new trial such as would probably have changed the result, should a new trial be granted; and, Third, was the appellant required to show due diligence in securing the facts and evidence relied upon in his motions for new trial," 11 Ariz. App. 223, 225, Appendix to Petition for Certiorari, p. A26.

Rule 23 1 (f) of the Rules of this Court provides as follows:

> (f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter

appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

The Petitioner has not complied, and could not comply, with the requirement of Rule 23 that he "show that the federal question was timely and properly raised so as to give this court jurisdiction to review *the judgment* on writ of certiorari." (Emphasis added.)

"The judgment" sought to be reviewed in the instant case is not the 1967 judgment dealing with the jury trial issue, but rather the 1970 judgment affirming the denial of a motion to set aside judgment under Rule 60(c) of the Arizona Rules of Civil Procedure.

Here again, the fact that the federal issue was timely raised before the Arizona Supreme Court in 1967 is immaterial. This Petition does not seek review of the 1967 judgment of the Arizona courts, nor could it. Review of that judgment by this Court has already been attempted by the Petitioner and denied by this Court.

Gant v. City of Oklahoma City, 289 U.S. 98 (1933) and other cases upon which Petitioner relies, only emphasize the Petitioner's error. Those cases stand for the proposition that where a case is remanded to the state court by this Court on the ground that the state court decision was not final and therefore not reviewable by this Court, this Court will consider the federal issues when the case reaches this Court on a petition from a final state court judgment, so long as the federal issue was raised at some appropriate point. The reason for such a rule is obvious. The federal issue is not before this Court until a Petition is taken from a final judgment of the state court.

It has never been contended, nor could it have been contended, that the decision which was reviewed by this Court in *Morgan v. Hays* in 1967 was not final. It was final. As a conse-

quence, the federal issue was presented to this Court and argued on its merits both by the Petition for Certiorari and by the Brief in Opposition. The ruling of this Court was a denial of the Petition for Certiorari, not a remand on the ground that the decision of the state court was not yet final.

If there had been a finality issue in *Morgan v. Hays* in 1967, and if this Court had remanded at that time because the case was not final, then the jury issue would be before the Court now. But there was no finality problem in *Morgan v. Hays*. The "QUESTIONS PRESENTED" by that case, as viewed by the parties, were as follows:

For the Petitioner:

"1. Despite the commands of the Seventh and Fourteenth Amendments to the Constitution of the United States, may an Arizona Superior Court refuse a plaintiff a jury trial seasonably demanded upon the fact issues which must be resolved in making a determination as to whether or not a workman is within the coverage of the Arizona Workmen's Compensation Act or alternatively, has an option to maintain a common-law negligence action when these fact issues are interwoven with the fact issues of the total case and the evidence is in sharp dispute?

"2. May a Superior Court Judge, on a defendant's motion to dismiss, grant the defendant's affirmative defenses of *"waiver, release* and *election of remedies"* in view of the Federal Constitutional mandates which afford Petitioner a trial by jury by virtue of the applicability of the Due Process clause of the Fourteenth Amendment to the states?"

Petition for Certiorari, Morgan v. Hays, No. 454, O.T. 1967, p. 2, (Emphasis in original.)

For the Respondent:

"Whether this Court should overrule almost a century of decisions of this Court and numerous other federal and state courts, and require the states to furnish jury trials conforming to the federal model in all civil cases involving more than $20.00."

Brief in Opposition to Petition for Certiorari, Morgan v. Hays, No. 454, O.T. 1967, p. 2.

These issues having been presented to the Court in *Morgan v. Hays,* and the Court having denied that Petition, the sole issues presently before the Court are those which were presented to, and considered by, the Arizona Court of Appeals in the decision which the Petitioner is now asking this Court to review.

III.

The Judgment of the Arizona Courts Rests Upon Adequate and Independent State Grounds

It is well settled that "this Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn,* 324 U.S. 117, 125 (1945). See also *Williams v. Kaiser,* 323 U.S. 471 (1945); *Black v. Cutter Laboratories,* 351 U.S. 292 (1956).

In the instant case, there are not only adequate and independent state grounds for the judgment which the Petitioner seeks to review; the only grounds for that judgment are state grounds.

(A) The judgment which this Petition seeks to review is a judgment affirming the denial by an Arizona trial judge of a motion to set aside a judgment under Rule 60(c) of the Arizona Rules of Civil Procedure. Under this rule, as well as under Rule 60(b) of the Federal Rules of Civil Procedure from which it was taken, the grant or denial of the motion is a matter which rests within the discretion of the trial judge, who has heard the evidence, had opportunity to assess it, and is most qualified to determine whether the introduction of additional evidence would change the result. *Laguna Royalty Co. v. Marsh,* 350 F.2d 817 (5th Cir. 1965); *West v. Gilbert,* 361 F.2d 314 (2d Cir. 1966), cert. den. 385 U.S. 919; *Raulins v. Wilson,* 66 Ariz. 267, 187 P.2d 322 (1947). In this case the trial judge denied

the 60(c) motion because, *inter alia*, "plaintiff has not produced any new evidence which would change the judgment of this Court and which if heard would have produced a different result . . . ." (Abstract of Record before lower court, p. 304.) This is one of the grounds on which the trial court was affirmed by the Court of Appeals, that Court's opinion stating "it is equally clear that [Petitioner's] second question — that the facts shown would probably have changed the result if a new trial were granted — is not supported by the record." 11 Ariz. App. 223, 227, Appendix to Petition for Certiorari, p. A-30.

Thus, the lower court has held that under Arizona law, in order to support a motion under Rule 60(c), the movant must show that the "new" evidence, if admitted, would probably have changed the result. The lower court also ruled that the Petitioner failed to prove this essential aspect of his case. These holdings involve solely issues of Arizona law.

(B) Even if all of the Petitioner's allegations concerning misconduct were correct — and we strenuously deny them — the allegations all pertain to the circumstances under which the form C-407, plaintiff's Exhibit 41, were obtained.[7] Though Peti-

[7]Perhaps it would be better not to dignify the intemperate and conclusory assertions of "shabby fraud" which permeate the Petition by even acknowledging their existence. However, because of the implication that not only officials of the Arizona Industrial Commission, but also the Arizona courts have somehow become co-conspirators in denying the Petitioner's rights, a brief reply is warranted. The Petitioner would imply that his allegations of misconduct are an established fact, an implication which is unfounded. As the matter was presented to the trial court—and subsequently to the appellate courts—there was a conflict in the evidence concerning whether any impropriety existed in connection with the form C-407. With regard to the alleged secreting of a witness—upon which the Petitioner dwells most heavily—the conflict in the evidence was a conflict between the testimony of not only the chief counsel for the Arizona State Industrial Commission but also the head of the Private Carrier Department of the Industrial Commission, as opposed to one of three stories which have been told by a claims investigator for the Industrial Commission.

Very simply, the Arizona courts found it unnecessary to resolve this conflict, and therefore did not do so, because of their holding that under

tioner has never been willing to acknowledge these rulings, both the Arizona Supreme Court in the 1967 decision, *Morgan v. Hays*, and the Court of Appeals in the instant case have squarely held that as a matter of Arizona law — independent of whatever significance the C-407 might have had — Petitioner's written applications for and acceptance of Workmen's Compensation and hospital and medical benefits on fourteen different occasions over a period of more than six months constitutes a waiver of his right to sue his employer.

Therefore, even if Petitioner were correct in asserting that the alleged "fraud perpetrated by the chief counsel and subordinate employees of the Arizona Industrial Commission violated the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth" (Petition p. 19) the argument is nevertheless wide of the mark. The Arizona courts have held that Petitioner's application for and acceptance of benefits under the Workmen's Compensation Act on numerous occasions subsequent to and independent of the execution of plaintiff's Exhibit 41 are sufficient standing alone to constitute a waiver under Arizona law. There has never been any allegation of fraud or other misconduct pertaining to the applications for and acceptance of benefits subsequent to April 23, 1962.

The Petitioner asserts that had it not been for the execution of form C-407 the Industrial Commission "would have been entirely without jurisdiction and could not have made an award of benefits of any kind," (Petition, p. 13) citing *Collins v. Indus-*

Arizona law the presence or absence of the plaintiff's Exhibit 41 made no difference in any event. There is nothing unconstitutional, sinister, or even unusual about such a holding. Indeed, it is customary procedure both in this Court and other courts not to pass upon issues which are not essential to the decision of the case. This is especially true of alleged fact issues urged before an appellate court. It is therefore not only unnecessary but also unfair to state that the Arizona courts have been unequal to the task of preserving the Petitioner's constitutional rights, when all that those courts have held is that they will not decide an issue which under controlling Arizona law is not essential to the disposition of the case.

trial Commission, 102 Ariz. 509, 433 P.2d 801 (1967). This assertion ignores the provisions of A.R.S. § 23-1024, (see footnote 5) and the holdings of the Arizona courts in these *Morgan v. MGM* cases. The statute plainly provides that application for *or* acceptance of benefits constitutes a waiver of common law rights, and in this case the Arizona courts have held that by his application for and acceptance of benefits — aside from the C-407 — Morgan waived his common law rights. Here again, therefore, Petitioner is simply quarreling with the Arizona courts on an issue of Arizona law. *Collins v. Industrial Commission* holds that the Industrial Commission does not have jurisdiction in the absence of any formal written claim being filed with the Commission. We disagree with the Petitioner that the *Collins* holding is inconsistent with the holding presently at issue, since in this case formal written claims were filed, fourteen of them in all. But the scope of the *Collins* holding, and its bearing, if any, on the issues in this case, are questions for the Arizona courts.

(C) In addition to sustaining the trial court on the ground that the "new" evidence would not have changed the result, the Court of Appeals also held that under Arizona law, the ruling of the Arizona Supreme Court in *Morgan v. Hays* was res judicata, and that the issue of MGM's amenability to suit could not be raised again. The Arizona Supreme Court declined to review this holding by the Court of Appeals.

The effect of a prior judgment of an Arizona court interpreting Arizona's Workmen's Compensation statutes involves solely questions of Arizona law. Even the Petitioner implicitly recognizes this. In his Petition, he is forced to contend that the lower courts erred in applying Arizona law: "Arizona is committed to the principle that a final judgment may always be impeached for fraud . . ." Petition, p. 17. The Petitioner's assertions notwithstanding, the lower court has held that a final judgment may not be impeached for fraud, where the alleged fraud pertains to matters outside the scope of the original mandate. Even more important, however, even if the Petitioner were correct as to the

Arizona law of judgments, this Court does not sit to correct errors of state courts in announcing state law.

(D) Under applicable Arizona law Workmen's Compensation coverage precludes suit against the employer by an injured employee if either (1) the employer has complied with legal requirements concerning notice of coverage and availability of rejection slips, A.R.S. § 23-906, or (2) the employee has actually applied for or accepted Workmen's Compensation benefits, A.R.S. § 23-1024.

The trial court in its 1965 judgment ruled in favor of the defendant on both of the foregoing grounds. (See Findings of Fact and Conclusions of Law, Appendix A, pp. 22-30.) The Arizona Supreme Court in 1967 affirmed solely on the waiver ground, finding it unnecessary to deal with other issues, including the sufficiency of notice and availability of rejection slips. However, the trial court's original holding on this issue cannot be ignored, and it constitutes a sufficient and independent state ground for the decision.

The notice which the trial court found sufficient to satisfy the statutory requirements was actual, rather than constructive notice.[8] As set forth in the trial court's findings of fact, after the decision of the Arizona Supreme Court in *Gene Autry Productions v. Industrial Commission*, 67 Ariz. 290, 195 P.2d 143 (1948) and the adoption of A.R.S. § 23-1041 E, the Arizona Industrial Com-

[8]Under A.R.S. § 23-906, constructive notice is given by posting written notices at conspicuous places on the employer's premises. In the context of the movie industry, the difficulty of keeping these notices posted in "conspicuous" places is immediately apparent, because of the ambulatory nature of the work done in filming movies. The instant case provides an excellent example. Filming work for "How The West Was Won" was accomplished in Arizona at a variety of locations. The trial court held that MGM had posted notices at some of these locations, but that proof of notice posting was inadequate as to others. (Findings of Fact Nos. 17, 24, 25, Appendix pp. 26-27.) The inherent difficulty of giving constructive notice to members of the movie industry demonstrates the wisdom of the procedure which has been worked out between the Arizona Industrial Commission and the industry to give actual notice by means of the endorsement discussed above.

mission and the movie industry negotiated and agreed upon an endorsement to Workmen's Compensation insurance policies issued to members of the movie industry in the State of Arizona. The purpose of this endorsement — Exhibit 25 in evidence in this case — was to give actual notice to movie industry employees of the existence of Workmen's Compensation insurance benefits; their right to reject Workmen's Compensation coverage; the amount of benefits to which they would be entitled; and the fact that if they did not reject the coverage they would be deemed to have accepted it. (Finding of Fact Nos. 9-11, Appendix pp. 24-25.)

It is the practice of the Industrial Commission to assign an investigator to each employer filming a picture or portion of a picture in Arizona. This investigator presents the above-described endorsement to each employee of such employer for signature, and if requested, explains the purpose and function of the document. (Findings of Fact No. 12, Appendix p. 25.) Such an endorsement was presented to Mr. Morgan on March 12, 1962, and he signed it. (Finding of Fact No. 14, Appendix p. 25.)

The trial court held that the imparting of notice by means of Exhibit 25 satisfied the notice requirements of the Arizona statutes.[9] (Conclusions of Law Nos. 2-4, Appendix pp. 29-30.) The Arizona Supreme Court found it unnecessary to review this holding and it has never been upset by any court. Therefore, it constitutes an independent state ground for the judgment.

(E) Assuming *arguendo* that this Court were willing to overlook the Petitioner's failure to raise the federal issue in the lower courts, and the fact that this issue was already passed upon by this Court three years ago, and assuming further that the Court were now to conclude that the Petitioner is entitled

[9]This holding is also in accord with the holdings of other courts. See *Daniels v. Charles Boldt Co.*, 88 S.E. 613 (W.Va. 1916); *Maynard v. Island Creek Coal Co.*, 175 S.E. 70 (W.Va. 1934); *Globe Indemnity Co. v. Peckham*, 92 A.2d 406 (N.H. 1952); and *Dey v. Logan*, 7 S.E.2d 402 (Va. 1940).

to a jury trial on the waiver issue, there would still be separate and independent state grounds which have nothing to do with the waiver issue. For example, the holding of the Arizona courts dealing with the effect of a prior judgment under Arizona law involves a legal question to be decided by the court, and not a question which must, as a matter of constitutional right, be submitted to a jury. Not even the Petitioner has ever contended otherwise. Thus, when the res judicata issue was briefed and argued before the lower courts, Petitioner did not contend that he was entitled to a jury trial on that issue.

Similarly, the original holding of the trial court in 1965 that by giving actual notice as opposed to constructive notice, MGM sufficiently complied with the notice requirements of the Arizona statutes, was a ruling on an issue of law. No one has ever contended, nor could it be contended, that that ruling involved an issue for the jury. There was no dispute concerning whether Morgan did or did not sign Exhibit 25. The sole question was the legal effect of the signing of that document under Arizona law.

Therefore, even if this Court were to hold that the Seventh and Fourteenth Amendments require that the waiver issue be decided by a jury, such a holding would still not entitle Petitioner to a new trial in this case because there are other, dispositive, state grounds for the judgment of the lower courts, which do not involve jury questions.

CONCLUSION

Over a period of eight years this case has now been before four different courts on ten different occasions, seven of which involved appellate court review sought by the Petitioner. There comes a time in the history of every litigation when all relevant issues have been laid to rest, and the litigation must come to an end. We submit that that time has now come for Morgan v. MGM. The Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

ROBERT D. MORGAN, Plaintiff vs. METRO-GOLDWYN-MAYER, INC., a Delaware corporation, Defendant	No. 145087 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This matter having come on regularly for hearing before the Court on June 10, 1964, on Defendant's Motion to Dismiss, and the Court having heard evidence on said date, and the hearing of evidence having continued through June 11, 12 and 15, respectively, and the Court having heard argument of counsel, taken the matter under advisement, and now being fully advised in the premises makes Findings of Fact, Conclusions of Law, and enters Judgment as follows:

FINDINGS OF FACT

1. The plaintiff, Robert D. Morgan, is, and at all times relevant hereto was, a citizen and resident of the state of California.

2. The Defendant, Metro-Goldwyn-Mayer, Inc., hereinafter referred to as "employer", is, and at all times relevant hereto was a corporation incorporated under and by virtue of the laws of the State of Delaware and having a principal place of business in Culver City in the State of California.

3. On March 9, 1962, at the offices of employer in Culver City, California, Plaintiff entered into a written contract of employment with the employer whereby Plaintiff agreed to perform as a stunt man for employer in the filming of a motion picture entitled "HOW THE WEST WAS WON", which picture was to be partially filmed at various locations in the State of Arizona.

4. This Court can and does take judicial notice of the provisions of Sections 3600.5 and 3601 of the Labor Code of the State of California, as follows:

"§ 3600.5 Injuries in extraterritorial employment

"(a) Domestic employment; foreign injury. If an employee who has been hired or is regularly employed in this State receives personal injury by accident arising out of and in the course of such employment outside of this State, he, or his dependents in the case of his death, shall be entitled to compensation according to the law of this State.

"§ 3601. Exclusive remedy. Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706, the exclusive remedy against the employer for the injury or death." (Stats. 1937, C. 90, p. 269, §3601.)

The Court can and does take judicial notice of the fact that the aforesaid statutes were in full force and effect on the date that plaintiff was injured in the course and scope of said employment in the State of Arizona as hereinafter set forth.

5. The employer fully complied with the laws of the State of California and had in full force and effect Workmen's Compensation Insurance in compliance with the laws of the State of California which covered the plaintiff in his employment by employer.

6. The employer complied with the laws of the State of Arizona with respect to securing Workmen's Compensation Benefits for the plaintiff and the employer's other employees by obtaining a policy of insurance in the State Fund of Arizona through the

Industrial Commission of Arizona which said policy was in full force and effect at all times relevant hereto.

7. The employer is a member of the movie industry, and among other things, engaged in the business of filming and making motion pictures.

8. The Court takes judicial notice of the case of *Gene Autry Productions against Industrial Commission*, 67 Ariz. 290, and its holding.

9. The Court can and does take judicial notice of the fact that subsequent to the decision of the Supreme Court of Arizona in the *Gene Autry Case*, Supra, the people of Arizona adopted an initiative measure which became effective on November 22, 1948, and which is now subsection E of Section 23-1041, Arizona Revised Statutes, which said initiative measure provided that in computing the average monthly wage of employees for purposes of Workmen's Compensation, there shall be excluded from such computation all amounts or wages or other compensation for services in excess of $1,000.00 per month.

10. That after the adoption of the aforesaid initiative measure the Industrial Commission of Arizona and the movie industry negotiated and agreed upon an endorsement to Workmen's Compensation Insurance policies issued to members of the movie industry in the State of Arizona; which endorsement is in the form of "Exhibit 25" in evidence, said exhibit being an endorsement to and a part of the Workmen's Compensation Insurance policy issued to the employer in connection with the filming of the picture "HOW THE WEST WAS WON".

11. The purposes of the aforesaid endorsement to said Workmen's Compensation Insurance policies and the administrative practices adopted by the Industrial Commission of Arizona in connection with the use thereof is to give actual notice to employees of employers who are members of the movie industry of the existence of Workmen's Compensation Insurance Benefits for

such employees; the right of such employees to reject the provisions of the Arizona Workmen's Compensation Law; that if they do not reject the law they are deemed to have accepted the benefits thereof; the amount of their compensation benefits and the manner in which the same shall be determined and to form an agreement between the employer and the Industrial Commission of Arizona with respect to the computation of premiums of such policies.

12. Subsequent to the adoption of the form of "Exhibit 25" in evidence by the Industrial Commission and the movie industry, the Industrial Commission of Arizona, in accordance with its administrative practices, assigns an investigator to each employer in the movie industry filming a picture or a portion of a picture in the State of Arizona to contact each employee of such employer, present "Exhibit 25" to such employee for signature and to explain, upon request, the content, purpose and function of said document.

13. In connection with his employment by employer, Plaintiff came from the State of California to Prescott, Arizona, on March 11, 1962. On that date employer maintained a business office in the St. Michael's Hotel in Prescott, Arizona, in connection with its filming location near Perkinsville, Arizona, and in the Arcadia Lodge Motel in Kingman, Arizona, in connection with its filming location near Oatman, Arizona.

14. On the 12th day of March, 1962, one Harry J. Hamilton, an employee and investigator of the Industrial Commission of Arizona, having been assigned by said Commission to the Prescott and Perkinsville office and location of the employer in connection with the filming of the picture "HOW THE WEST WAS WON", presented "Exhibit 25" in evidence to the plaintiff while on location at Perkinsville, Arizona, and said "Exhibit 25" was signed by the Plaintiff on that date.

15. The Plaintiff knew that the person presenting said "Ex-

[illegible] to him for signature was an employee of the Industrial Commission of Arizona, and he further knew that the document which he signed, among other things, provided that in case of injury in the course of his employment his Workmen's Compensation Benefits would be a maximum of 65% of $1,000.000 per month.

16. At the time the plaintiff signed "Exhibit 25" in evidence he was not misled, defrauded, coerced or otherwise prohibited from reading or understanding all of the provisions thereof.

17. The employer had the statutory notice of Workmen's Compensation posted upon a bulletin board located near the paymaster's desk in its office in the St. Michael's Hotel in Prescott, Arizona.

18. The plaintiff was in the aforesaid office of the employer in the St. Michael's Hotel in Prescott, Arizona, on or about March 12, 1962, and received cash for a meal allowance from the auditor or paymaster of the employer in said office.

19. On or about March 18, 1962, plaintiff was transferred by employer to Kingman, Arizona, where he worked at its filming location at Oatman, Arizona, until the latter part of March, 1962.

20. Omitted.

21. In addition to the aforesaid offices at Prescott and Kingman, Arizona, from on or about March 12, 1962, until on or about April 25, 1962, employer maintained an office in the Velda Rose Motel east of Mesa, Arizona, and had a filming location on the Magma Railroad west of Superior, Arizona. Meal allowances and advances on salaries to employees working in connection with the filming on the Magma Railroad were paid by employer from its office in the Velda Rose Motel.

22. During the latter part of March, 1962, or early April, 1962, plaintiff was transferred from Kingman, Arizona, to Mesa, Arizona.

23. Various employees of employer stayed at the Ramada Inn

in Phoenix and at the Superstition Ho Hotel at Apache Junction in connection with the filming work which employer did on the Magma Railroad. Bulletin boards for call sheets and other notices were maintained by employer in each of these hotels.

24. The employer had the statutory notice of Workmen's Compensation posted in its office in the Velda Rose Motel, east of Mesa, Arizona, first upon the end of the counter and then on the bulletin board from on or about March 12, 1962, until said office was closed on or about April 25, 1962.

25. The places where the Workmen's Compensation notices were posted on defendant's premises were conspicuous but defendant did not prove that such a notice was posted in or about the Ramada Inn or the Superstition Ho Hotel or on the job site near Queens where it was doing filming work on the Magma Railroad at the time of plaintiff's injury.

26. The employer had the rejection slips referred to in Section 23-906, ARS, available at its office where plaintiff was employed and at each of its offices in the State of Arizona during all of the time of plaintiff's employment.

27. On April 9, 1962, while engaged in doing stunt work on location near Superior, Arizona, in the course and scope of his employment, plaintiff sustained the injuries out of which his present claim arose.

28. Following his injuries on April 9, 1962, plaintiff was hospitalized in Good Samaritan Hospital in Phoenix, Arizona, until September 4, 1962, at which time he was released to go to a hospital in Los Angeles, California.

29. Following his admission to the hospital and on or about April 16, 1962, plaintiff sought and obtained the legal advice of the law firm of Snell & Wilmer, Phoenix, Arizona, and in particular, consulted with Mr. Frederick K. Steiner, Jr., a partner, and Donald Daughton, an associate of that law firm.

30. On April 16 and again on April 19, 1962; when plaintiff

was interview by said attorneys while in the hospital, he was lucid and responsive and was able to give an account of the accident and expressed a strong desire to sue his employer for what he believed was their negligence. He advised said attorneys that he had signed some document respecting Workmen's Compensation and that, among other things, said document provided that his benefits would be 65% of $1,000.00 per month.

31. The plaintiff sought and received legal advice from said attorneys with respect to whether or not he had an option to sue his employer for damages; that he was advised by said attorneys that his sole and exclusive remedy was a claim against the Industrial Commission of Arizona for Workmen's Compensation Benefits unless his employer failed to comply with the requirements of the Act in obtaining Workmen's Compensation Insurance, posting of notices of availability of rejection slips. Said attorneys advised him that he should accept Workmen's Compensation Benefits, said advice being given both orally and in writing.

32. After consulting with said attorneys and on or about April 23, 1962, plaintiff executed or caused to be executed and filed with the Industrial Commission of Arizona a document entitled "Workman's Report of Injuries and Application for Benefits".

33. Thereafter and on May 23, 1962; June 27, 1962; July 13, 1962; July 20, 1962; July 28, 1962; August 2, 1962; August 16, 1962; September 1, 1962; September 16, 1962; October 1, 1962; October 17, 1962; November 2, 1962; November 16, 1962; and December 2, 1962, plaintiff executed or caused to be executed documents entitled "Workman's Supplemental Claim for Compensation" and filed or caused the filing of said documents with the Industrial Commission of Arizona, knowing and understanding that these were claims for Workmen's Compensation.

34. The Industrial Commission of Arizona caused to be paid and plaintiff accepted Workmen's Compensation Benefits pursuant to each of the aforesaid "Workman's Report of Injury and

Application for Benefits" and "Workman's Supplemental Claim for Compensation" under and pursuant to the provisions of the laws of the State of Arizona for the period from April 10, 1962, through November 16, 1962, in the total sum of $4,795.41.

35. In addition to the aforesaid Workmen's Compensation Benefits, the Industrial Commission of Arizona paid or caused to be paid medical and hospital expenses of plaintiff in the sum of $15,246.70.

36. On or about October 20, 1962, plaintiff consulted with attorneys Raoul D. Magana of Los Angeles, California, and Charles M. Brewer of Phoenix, Arizona, with respect to any option which he might have to sue his employer and thereafter continued to file supplemental claims for Workmen's Compensation and accepted checks in payment of Workmen's Compensation Benefits.

37. The last check which plaintiff received from the Industrial Commission of Arizona, prior to filing his complaint against employer on December 13, 1962, was accepted, endorsed and cashed by the plaintiff in December of 1962.

CONCLUSION OF LAW

The Court concludes:

1. The plaintiff is charged with full knowledge of the contents of "Exhibit 25" in evidence at all times relevant hereto, and if he failed to read any of the provisions of said document, such failure was due to his own negligence and neglect and was not the result of any fraud or deception on th part of the investigator of the Industrial Commission of Arizona who presented said Exhibit to the plaintiff at the time that he, the plaintiff, executed the same.

2. The plaintiff had actual notice of Workmen's Compensation coverage and of his right to reject the provisions of the Arizona Workmen's Compensation Law and his failure to reject the same conclusively bound him to accept said benefits for any injuries suffered in the course and scope of his employment.

3. Actual knowledge is always better than constructive notice and the actual knowledge of the plaintiff of the contents of "Exhibit 25" in evidence satisfied the requirements of the statutes of this State with respect to the giving of constructive notice by an employer of Workmen's Compensation and the right of employees to reject the benefits of the Act.

4. "Exhibit 25" in evidence, having been negotiated by the movie industry and the Industrial Commission of Arizona, and the same constituting an endorsement to the Workmen's Compensation Insurance Policy issued by the Industrial Commission to the employer and pursuant to the administrative practices adopted by the Industrial Commission of the State of Arizona with respect thereto and the plaintiff having actual knowledge of the contents thereof and his rights thereunder fully complies with all of the legal requirements on the employer to give notice to its employees of the applicability of Workmen's Compsensation Benefits and of the right of its employees to reject the provisions of the Workmen's Compensation Laws of the State of Arizona.

5. The employer fully complied with the provisions of Section 23-906, ARS, with respect to the availability of rejection slips but did not comply with said Section with respect to the continuous posting of the Workmen's Compensation notice referred to in said Section.

6. The plaintiff, by making a claim for Workmen's Compensation Benefits and continuing to accept the same with full knowledge of his legal rights and with full knowledge of the legal conditions precedent to a suit against his employer, waived any right or option, if any, which he ever had to file any claim in this Court against his employer.

7. If plaintiff's exclusive remedy is not vested in the Industrial Accident Commission of the State of California, then his exclusive remedy against his employer is with the Industrial Commission of Arizona under the terms and provisions of the Workmen's Compensation Law of the State of Arizona.

8. By virtue of the foregoing conclusions, this Court does not have jurisdiction over the subject matter of this lawsuit and therefor the defendant's Motion to Dismiss should be granted and this cause should be dismissed and judgment should be entered in favor of the defendant.

JUDGMENT

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED AND DECREED that the defendant's Motion to Dismiss for lack of jurisdiction of this Court over the subject matter of plaintiff's complaint be granted, and that plaintiff's complaint be and it is hereby dismissed with prejudice.

DONE IN OPEN COURT This 5th day of January, 1965.

JACK D. H. HAYS
Judge of the Superior Court

APPENDIX B

AFFIDAVIT

STATE OF CALIFORNIA)
) ss
COUNTY OF SANTA CLARA)

I, RICHARD J. DANIELS, being first duly sworn upon my oath, say:

1. That I am a duly licensed attorney at law admitted to practice in the State of Arizona but now am residing at 1621 Norcen Drive, in the City of San Jose, County of Santa Clara, State of California.

2. That I was Chief Counsel for the Industrial Commission of Arizona from 1963 to 1965 during which time I became aware of a Workmen's Compensation claim filed by Robert D. Morgan and also of his later lawsuit filed against his employer, Metro Goldywn Mayer, in Cause No. 115087 in the Superior Court of Maricopa County, Arizona, for injuries claimed to have resulted from the negligence of the said employer.

3. That Donald J. Morgan, my predecessor as Chief Counsel for the Commission, made an appearance in the said lawsuit on behalf of Metro Goldwyn Mayer by virtue of the Employers Liability Policy of Insurance issued by the Commission to Metro Goldwyn Mayer and as a successor to Donald J. Morgan as Chief Counsel, I later became an attorney of record in the said action.

4. That Rex H. Moore and Charles E. Esser of the law firm of Jennings, Strouss, Salmon & Trask, were employed by MGM and also become attorneys of record in the said cause of action; and I participated with the said attorneys in the preparation for the defense of the said lawsuit and in the hearings hereafter mentioned.

5. That a Motion to Dismiss the complaint of Robert D. Morgan was filed in the cause of action by MGM and a hearing thereon was commenced during June 1964 before the Hon. Jack D. H.

Hayes, which was held over a period of several days and at which hearing I was present.

6. That prior to the said hearing and in preparation therefor I participated with the other defense attorneys in reviewing the facts and the evidence, which included a conference with one GLENN JURGERMEYER, an employee of the Industrial Commission of Arizona; that after the conference with Mr. Jurgermeyer it was determined that he would not be called as a witness for the defense in said cause of action; and that before the hearing commenced Mr. Jurgermeyer was advised that he would not be needed as a witness by the defense.

7. That I have examined carefully the Application for Relief From Final Judgment filed by Robert D. Morgan in the Supreme Court of Arizona in Cause No. 8653, together with all documents and papers attached thereto; that I have given special consideration to those documents or papers which either directly state or imply that I gave either direction or suggestion to Mr. Jurgermeyer to avoid any process server or that he secrete himself, or that he leave Maricopa County; and, I also have given considerable consideration to the further allegation that some representative of MGM gave such advice or direction to Mr. Jurgermeyer.

8. That I did not ever give Mr. Jurgermeyer advise or directions directly or through any other person that he should avoid any process server, disappear, secrete himself, leave Maricopa County, use any fictitious name, or otherwise fail or refuse to appear in court if requested, and I do not know of any other person, including any representatives or attorneys o MGM who gave any surh advice or directions, other than the advice given to Mr. Jurgermeyer at the conference with him which was attended by Mr. Moore and other prior to the time of hearing when it was merely determined that he would not be called by the defense as a witness and he was so advised.

9. That prior to, at all times during, and subsequent to the June 1964 hearing, Charles M. Brewer, one of the attorneys for

Robert D. Morgan, had access to the Morgan files at the Industrial Commission of Arizona, and Mr. Brewer otherwise was aware of the prior participation or activites of Mr. Jurgermeyer as an investigator for the Commission, which is shown in part by the investigative report signed by Mr. Jurgermeyer and his superior, Aaron Nelson, dated April 24, 1962, which is a part of the Application for Relief which showed that Mr. Morgan had been contadted at the hospital, that the Commission's Claim Form C-107 had been obtained, and also that Mr. Morgan had signed the Stipulated Wage Schedule on March 12, 1962 prior to his injury; but at no time prior to, during, or after the said hearing, did Mr. Brewer request the presence of Mr. Jurgermeyer, or did he advise the Court that Mr. Jurgermeyer was required as a witness so that the Court could direct the defense counsel to produce Mr. Jurgermeyes, or did Mr. Brewer request the Court for a continuance pending the subpoena of Mr. Jurgermeyer.

10. That I was not aware of the existence of any subpoena for Mr. Jurgermeyer prior to or at the time of the June 1964 hearing, nor that he was desired as a witness until long after the entry of the Judgment of Dismissal in January 1965, and that I acquired suih information only after the deposition of Mr. Jurgermeyer had been noticed and a Motion for New Trial had been filed in the spring of 1965, after which I participated in a conference with Mr. Jurgermeyer in my office at the Industrial Commission of Arizona, which also was attended by Mr. Moore and others.

11. That during the said conference Mr. Jurgermeyer related to us that he had obtained the signature of Mr. Morgan on the Commission's Form No. C-107, in fact I specifically recall how Mr. Jurgermeyer described to us that it had been necessary for him to put something hard and flat under the paper for Mr. Morgan to sign.

12. That I further recall that in the same conference Mr.

Jurgermeyer related to us that he had left his home on the Sunday night during the hearing strictly on his own volition.

13. That Mr. Jurgermeyer was not an investigator in the legal division of the Industrial Commission but was under the supervision of Mr. Aaron Nelson; I did not give any directions, either to Mr. Nelson or to Mr. Jurgermeyer, relating to the avoidance of service of a subpoena, as I have earlier stated.

14. That while the numerous allegations in the Application for Relief or in the papers attached thereto suggest that the Industrial Commission of Arizona had some interest in keeping Mr. Jurger out of Court as a witness, I can not conceive of any reason why any officer, agent, employee, or attorney of the Industrial Commission would have wanted to withhold any information from the Court which would have resulted in a determination that the Court had jurisdiction to hear evidence in Mr. Morgan's claim against his employer; in fact I recall later advising the members of the Industrial Commission when this issue had been raised that substantal funds would be saved to the Commission if MGM were required to pay a judgment to Mr. Morgan and that this would thereby relieve the Commission of its obligation to pay any compensation for medical benefits.

15. That based upon my knowledge of the practices of the Industrial Commission of Arizona in handling the compensation policies for the movie industry in Arizona and from my knowledge of the files which I have seen, such as the Stipulated Wage Schedule, I am satisfied that Robert D. Morgan could not have been employed by MGM in Arizona unless he either signed the Stipulated Wage Schedule and thereby agreed to be bound by the compensation laws or unless he specifically rejected the benefits of the compensation laws; and I further recall that I saw his signature on the Stipulated Wage Schedule which was admitted in evidence at the hearing in June 1964.

16. That during the hearing before Judge Hayes I heard testimony that Mr. Morgan had signed the Stipulated Wage

Schedule, and also that he had been advised by attorneys from a Phoenix law firm as to his rights under the compensation laws, and that after such advice he accepted and continued to accept periodic compensation payments.

17. That in the Application for Relief is a memorandum directed to me by Thomas L. Hall, dated October 30, 1964, which was more than four months after the hearing before Judge Hayes; that this memorandum was not a result of any proceedings in the Morgan case; that I had learned from another employee of the Commission that two claims of other parties which were similar in nature had been resolved in a contradictory manner, and I had requested Mr. Hall to investigate and report to me; that I had no knowledge of the claims that he was investigating, nor that the claimant, Krouse, had any conncetion with the Morgan case; and that so far as I am aware, the concluding paragraph of the said report was strictly the specultion of Mr. Hall.

18. That I have never had nor do I now have any personal interest in the outcome of the Morgan case and that my only connection with it was solely in my capacity as Chief Counsel of the Industrial Commission of Arizona.

RICHARD J. DANIELS

Subscribed and sworn to before me this 3rd day of May, 1967.
VIVIAN A. HAAGEN

Notary Public in and for the County of Santa Clara, State of California.

APPENDIX C

AFFIDAVIT

STATE OF ARIZONA

ss.

COUNTY OF MARICOPA

I, AARON NELSON, being first duly sworn upon my oath state:

That for the past 28 years, except for 6 years in the Service, I have been and am now employed by the Industrial Commisison of Arizona. Since July, 1964, I have been and am now the head of the Private Carrier Department of the Commission. In June, 1964, and for 12 years before that I was in charge of the investigation section of the Claims Department of the Commission. One of my investigators in June, 1964, was Mr. Glenn E. Jurgemeyer.

On Monday, June 15, 1964, at my direction, Mr. Jurgermeyer took 17 Commission files, which had been pulled during the preceding week, covering cases at Coolidge, Casa Grande and Eloy, Arizona, for a routine investigation of the cases covered by said files in those areas.

Mr. Jurgemeyer was in Phoenix during the week preceding June 15 and had been assigned the above investigations to commence on June 15 as a part of his routine duties. I did not check with nor talk to any attorneys or representatives of Metro-Goldwyn- Mayer, Inc., or with anyone else about assigning Mr. Jurgemeyer to this job on these files in Coolidge, Casa Grande and Eloy. Metro-Goldwyn-Mayer, Inc., had nothing whatsoever to do with my directing Mr. Jurgemeyer to go out on this investigation on June 15, 1964, or at any other time.

Dated this 26th day of April, 1965.

/s/ Aaron W. Nelson

Subscribed and sworn to before me this 26th day of April, 1965.

/s/ Lillian E. Mills
Notary Public

My commission expires: 12-12-66.

SAR 54-55.